ubmitted Jany 9, 74

Reversed

18 626

Postponed — Jany 17. 74.

Jud. Davis

Reversed

Davis

Dissents

TRANSCRIPT OF RECORD.

UPREME COURT OF THE UNITED STATES.

No. ~~405~~ 190

E CITY OF DAVENPORT AND JOHN KAUFMAN, MARSHAL OF SAID CITY, APPELLANTS,

VS.

DAVID DOWS.

EAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED AUGUST 6, 1872.

— Reversed —

Want of parties —

Oct. 2, 1898

SUPREME COURT OF THE UNITED STATES.

No. 405.

THE CITY OF DAVENPORT AND JOHN KAUFMAN, MARSHAL OF SAID CITY, APPELLANTS,

VS.

DAVID DOWS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

INDEX.

	Original.	Print.
Petition	3	1
Notice for injunction	20	5
Subpœna	23	6
Record entries, October 30, 1868	26, 27	7
Injunction bond	28	7
Injunction	30	8
Defendant's demurrers	33, 36, 40	9, 10, 11
Stipulation to continue	45	13
Record entry, May, 1869	46	13
Decree	47	13
Petition for appeal	49	14
Record entry, May, 1872	53	15
Appeal bond	54	15
Citation	56	16
Clerk's certificate	57	16

1 Pleas in the circuit court of the United States, within and for the district of Iowa, before the Honorable James M. Love, judge of the United States district court for said district, at a term thereof begun and holden in the United States court-house, in the city of Des Moines, in said district, on the third Tuesday the nineteenth day of October, A. D. 1869, on Tuesday, the 2nd day of November, A. D. 1869.

2 Be it remembered that, heretofore, to wit, on the 28th day of October, A. D. 1868, came Mess. Cook & Drury, solicitors for David Dows, and filed in the clerk's office of the circuit court of the United States for the district of Iowa, his bill of complaint against the city of Davenport and John Kaufman, which bill is in words and figures following, to wit:

3 UNITED STATES OF AMERICA,
District of Iowa:

Of the October term, A. D. 1868, of the circuit court of the United States in and for the district of Iowa.

DAVID DOWS, A CITIZEN OF THE STATE OF New York,
vs.
THE CITY OF DAVENPORT AND JOHN KAUFMAN, a citizen of the State of Iowa.

To the honorable the circuit court of the United States in and for the district of Iowa:

Your orator, David Dows, a citizen of the State of New York, in behalf of himself and all other non-resident citizens of the State of Iowa, stockholders in the Chicago, Rock Island and Pacific Railroad Company, represents that he is the holder and owner of five hundred shares of stock in the said Chicago, Rock Island Railroad Company; that said stock is now worth, in the market, from three to
4 five per cent. above par, and that the interest of your orator in
said railroad company is now in value of at least fifty-three thousand dollars.

Your orator further represents, that the said Chicago, Rock Island and Pacific Railroad Company is a corporation created and existing under the laws of the State of Iowa, and that the same became incorporated on the 26th day of May, A. D. 1866, by compliance with the laws of the said State of Iowa, and amended July 23d, A. D. 1866. Your orator further represents, that said corporation was created and organized for the purpose of constructing and operating a railroad from the city of Davenport, commencing at the east line of said State, across the said State of Iowa, via the city of Des Moines, to Council Bluffs.

Your orator further represents that the capital-stock of said railroad company, consolidated as hereinafter set forth, paid in, amounts to the sum of fourteen millions of dollars; and the greater part, or
5 almost all of the stock in said company, is owned by non-resi-
dents of the State of Iowa; that, out of said fourteen millions of capital stock, there is not more than twenty thousand dollars of said stock owned by citizens of the State of Iowa.

Your orator further represents that, after its incorporation, they became the owners, by purchase, at judicial sale of the railroad constructed—the road-bed, depots, franchises, lands, and all the other property of the old Mississippi and Missouri Railroad Company; that said purchase was made on the 9th day of July, A. D. 1866, and at that time the said Mississippi and Missouri Railroad Company had constructed and in operation about one hundred and eighty miles of road.

Your orator further represents that, on the 20th day of August, A.
D. 1866, under and in pursuance of the laws of the State of Illinois,
and the State of Iowa, the said Chicago, Rock Island and Pacific Rail-
road Company consolidated with a railroad company incorpo-
6 rated and existing under the laws of the State of Illinois, known
and called the Chicago and Rock Island Railroad Company,
which said last-named railroad company then had one hundred and eighty-two miles of road constructed and in operation; that, by said agreement of consolidation, the capital-stock of both companies became merged in one company, and the said consolidated company assumed the name of the Chicago, Rock Island and Pacific Railroad Company.

Your orator further represents that, soon after the purchase of the said M. & M. Railroad, which, at the time of purchase, was only completed to Kellogg, and soon after said consolidation, the said Chicago, Rock Island and Pacific Railroad Company commenced the construction of said road west from said point, and have continued the construction of the same until, at this present the same is completed and in running order to a point about fifty miles west of the city of Des Moines, a total distance of two hundred and twenty-five miles from the
eastern boundary-line of the State of Iowa.

7 Your orator further represents that the "City of Davenport,"
a municipal corporation existing in and created under the laws
of the State of Iowa, and a citizen of the State of Iowa, pretends and insists that it has the legal right to impose a tax for general city purposes, and for revenue, on the property of the said Chicago, Rock Island and Pacific Railroad Company, situated and located within the limits of said city of Davenport, and for purpose of carrying into effect said pretense, they have caused to be assessed, by the regular assessor of the said of Davenport, the depot-grounds, and buildings thereon, of said railroad company, in said city, amounting to about ten acres, valued at one hundred and fifty thousand dollars; also, all the railway tracks, switches, and road-bed within the city, about two miles, valued at fifty thousand dollars; also, the north half of the railroad bridge cross
ing the Mississippi River inside the city-limits, valued at one
8 hundred and twenty-five thousand dollars, a copy of which said
assessment, as taken from the said assessor's book, is hereto
attached, and made a part of this bill.

Your orator further represents that said city of Davenport through its regular' appointed assessor, has levied and assessed on said described property of said railroad company as tax for revenue purposes for said city the sum of two thousand six hundred dollars, and have authorized and directed one John Kauffman, a citizen of the State of Iowa, and city marshal of said city of Davenport, to collect the said tax, and the said city marshal has served a notice on the officers of the said Chicago, Rock Island and Pacific Railroad Company, in words and figures following, to wit:

“MARSHAL’S OFFICE, CITY OF DAVENPORT,
“*June* 17*th*, 1868.

Chicago, Rock Island and Pacific Railroad Company:

“Your city tax, which is now due for the year 1868, is two
9 thousand six hundred dollars and cents, and unless said tax
is paid within twenty days, your property will be subject to levy and sale for amount of said tax.”

(Signed) “JOHN KAUFMAN,
“*City Marshal.*”

And the said city marshal now threatens to levy upon and take possession of the locomotives, cars, and rolling-stock of said railroad company, to satisfy and discharge said tax so assessed by said city of Davenport. And your orator makes the said city of Davenport and the said John Kaufman parties defendants in this suit.

Your orator represents and respectfully insists, that the said Chicago, Rock Island and Pacific Railroad Company is not liable to the payment of any taxes to the said city of Davenport for general revenue purposes, and that said levy and assessment are wholly void, and for cause show, that heretofore, to wit, on the 8th day of April, A. D. 1862, the general assembly of the State of Iowa passed an act, entitled, “An act to amend chapter forty-five of the revision of 1860, being an act in
10 relation to revenue.” By the sixteenth section of which said act
it is provided, that each railroad company in the State shall annually, on or before the first day of February, furnish to the State treasurer a sworn statement of the gross receipts of their railroad, without reduction of expenses for the year ending on the first day of January preceding, which said statement shall be sworn by the secretary and treasurer of such company; and the treasurer of State shall levy on such gross receipts a tax of one per centum, which the said railroad company shall pay on or before the 15th day of February; after which time the said taxes shall become delinquent, and the same penalties and interest shall attach as on other taxes.” After said section provides for the collection of said tax, and its distribution among the counties through which said road might run, it then provides that “the tax herein provided for shall be in lieu of all taxes for any and all
11 purposes on the road-bed, track, rolling-stock, and necessary build-
ings for operating the road. But other property belonging *is* such company, whether personal or real, shall be taxed as property of individuals in the respective counties in which the same may lie.” And said orator avers that the said tax is levied on the road-bed, track, rolling-stock, and the depot grounds, which contain the necessary buildings for operating their said railroad, and not on other property belonging to said company.

Your orator further represents that on the 8th day of April, A. D. 1868, another act was passed by the general assembly of the State of Iowa, by which the said act above recited was repealed, and another law on the same subject enacted by which the railroad companies in this State were subject to a tax of one per centum on their gross receipts, and after providing as to the mode of payment or collection, it is then provided that “the tax herein provided for shall be in lieu of all taxes for any and all purposes on the road-bed, track, rolling-stock,
12 and necessary buildings for operating their road,” which said
law is now in full force and effect.

Your orator further represents that from and after the passage by the general assembly of the State of Iowa of the act approved April

8th, 1862, and since the said Chicago, Rock Island and Pacific Railroad Company has had an existence in the said State, the said railroad company, through its officers, has annually made as required by law a sworn statement of the gross receipts of their said railroad to the treasurer of State, and the said treasurer has annually levied a tax on said gross receipts of one per cent., which said tax so levied was paid by said railroad company to the State treasurer, as required, and within the time required by said act; and said railroad company having so paid said tax levied on their gross receipts, your orator insists that the same is in full for all taxes due from said railroad company for any and all purposes whatever.

13 Your orator further represents that, 1st, the said railroad company is not liable to the payment of any tax to the city of Davenport for revenue purposes.

2d. That, if liable to the payment of a tax to said city for revenue purposes, this levy and assessment is null and void, as, if subject to tax, it can only be taxed through and upon the shares of its stockholders.

Your orator further represents that the said railroad company, as a corporation, has refused and neglected to take action to arrest the payment or collection of said tax, and therefore your orator, in behalf of himself and other non-resident stockholders, who are the real owners of the road, have to file this their bill to arrest and prevent the collection of the said tax so unlawfully assessed.

In consideration of the premises, and inasmuch as your orator can
only have adequate relief in a court of equity, where matters of this
14 kind are properly rec*ie*vable and cognizable, your orator prays,
that the writ of subpœna may issue against the said City of Davenport and the said John Kauffman, defendants, commanding, &c., and that upon the hearing of this cause it may be ordered, adjudged, and decreed, that the said tax so levied and assessed by the said city of Davenport may be set aside and declared null and void; also, that upon the final hearing of this cause, a perpetual injunction may be issued under the order and direction of this honorable court, enjoining and restraining the said city of Davenport, its agents, attorneys, officers, and marshal from levying, assessing, or collecting any tax on the rights, property, or franchises, of said railroad company for city revenue purposes, and particularly the tax hereinbefore referred to in this bill, and that in the meantime a temporary injunction issue under the order of this court, commanding and restraining the said city of Daven-
port and the said John Kauffman, city marshal, or any other
15 officer or agent of said city from collecting or proceeding to col-
lect said tax, or from levying on any property of said railroad company with the purpose of collecting said tax, but wholly to desist from any act or acts done with intent to collect said tax and for such other and further relief in the premises, as is consistent with equity and good conscience and as to your honor may seem meet; and as in duty bound your orator will ever pray, &c.

(Signed) DAVID DOWS.
(Signed) COOK & DRURY,
Sol. for Comp'nt.

STATE OF NEW YORK,
City & County of New York, ss:

On this 20th day of October, A. D. 1868, before me, personally appeared the above-named David Dows and made oath that he had read the above bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge. except as to the matters which are therein stated to be on his information or belief and as to 16 those matters he believes it to be true.

(Signed) SAM'L BLATCHFORD,
District judge of the United States for the
Southern District of New York.

(Endorsed:) Filed Oct. 28, 1868.
(Signed.) W. G. WOODWARD, *Clerk.*

17 Owners' names.	Description of property.	Value.
Chicago, Rock Island and Pacific Railroad Company.	All the depot grounds and buildings within the city of Davenport, containing about ten acres of land, described as follows, to wit: Beginning at a stake near the base of the Mississippi River, which starting point is 940 f't south of a point 1,548 2-100 f't west of the S. E. corner of Le. Claire's reserve, marked 1142, thence running north 33° 27 min. east, 200 feet; thence north 56° 30 min., west 64 f't; thence north 59° 33 min., west 112 feet; " " 68° 33 m., west 42 f't; thence " 71° 33 min., " 112 " " " 74° 33 m., " 112 "; " " 77° 33 min., " 112 " " " 80° 33 m., " 112 "; " " 83° 33 min., " 112 " " " 86° 33 m., " 112 "; " " 89° 1 min., " 73 " " west 209 f't, to west side of Le. Claire's; thence south 400 feet; thence east 200 f't; thence south 89° 1 min., east 63 feet; thence south 86° 33 m., east 88 f't; thence south 83° 33 min., east 88 feet, thence south 80° 33 m., east 88 f't; thence south 77° 33 min., east 88 feet; thence south 74° 33 m., east 88 f't; thence south 71° 33 min., east 88 feet; thence south 68° 33 m., east 88 f't; thence south 65° 33 min., east 88 feet; thence south 62° 33 m., east 88 f't; thence south 59° 33 min., east 88 feet; thence south 56° 33 m., east 88 f't; thence north 33° 27 min., east 400 feet to beginning.	150,000
	All the railway track, side-tracks, switches, and road bed within the city limits, about two miles.	50,000
18	The north half of the railroad bridge crossing the Mississippi River inside the city limits.	125,000

19 MARSHAL'S OFFICE, CITY OF DAVENPORT,
June 17th, 1868.

Chicago, Rock Island and Pacific Railroad Company:

Your city tax, which is now due for the year 1868, is two thousand six hundred dollars and no cents.

And unless said tax is paid within twenty days your property will be subject to levy and sale for amount of said tax.

(Signed) JOHN KAUFMAN,
City Marshal.

20 And there was filed in said clerk's office in said cause a notice for injunction, which notice, with the marshal's return thereon, is in the words and figures following:

UNITED STATES OF AMERICA,
District of Iowa:

DAVID DOWS
vs.
THE CITY OF DAVENPORT AND JOHN KAUFFMAN.

To the above defendants:

You will take notice that, on the 23d day of October, A. D. 1868, at 10 o'clock a. m. of said day, or as soon thereafter as counsel can be heard at the city of Des Moines, we shall apply to the judges of the circuit court of the United States for the district of Iowa, or one of them, for an order for an injunction to be issued in the above cause restraining and enjoining the said defendants from collecting a tax for revenue purposes from the Chicago, Rock Island and Pacific 21 Railroad Company for the year 1868, at which time and place you may attend if you see proper.

Dated October 26th, 1868.

(Signed) COOK & DRURY,
Attorneys for Compl't.

22 *Marshal's return.*

UNITED STATES OF AMERICA,
District of Iowa, ss:

Served the within notice upon the within-named defendants, the city of Davenport & John Kaufman, by reading it to M. Donahue, personally, mayor of the city of Davenport, for service on city, and by reading it to John Kauffman, defendant, personally, and by delivering a copy thereof to said Donahue, mayor, and to said Kaufman. The aforesaid service made at Davenport in said district on the 26th day of October, A. D. 1868.

(Signed) G. W. CLARK,
U. S. Marshal Dist. of Iowa.
By JOHN ACKLEY,
Deputy.

Fees & expenses: Service of notice, 3.00; copies, 1.00; mileage, .50—$4.50.

23 And on the 11th day of November, A. D. 1868, there issued out of said clerk's office in said cause a subpœna in chancery against said defendant; which is in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Iowa, ss:

The president of the United States to the city of Davenport and John Kauffman:

We command you and each of you, that you appear before the judges of the circuit court of the United States for the district of Iowa, at Des Moines, on the first Monday, it being the 7th day, of December next, (A. D. 1868,) to answer to the bill of complaint to David Dows, this day filed in the office of the clerk of said court, and then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal*l* of the district of Iowa, returnable to the first Monday in December, A. D. 1868.

24 Witness, the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the U. S. at Des Moines, this 11th day of November, A. D. 1868.

[SEAL.] (Signed) W. G. WOODWARD, *Clerk.*

MEMORANDUM.—The within-named defendants are notified that, unless they enter their appearance in the cl'k's office of said court at Des Moines aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against them as confessed, and a decree entered thereon accordingly.

[SEAL.] (Signed) W. G. WOODWARD, *Clerk.*

25 And afterwards, on the 7th day of December, said subpœna was returned to said clerk's office by the marshal, with this return thereon, of which return the following is a copy:

This subpœna came into my hands for service on the 11th day of November, 1868, and served it on the City of Davenport by reading the same to John Kaufman, marshal of said city, and by delivering to him a copy on the 16th of November, 1868, and by reading same to O. S. McNeil, acting mayor of said city, and by delivering to him a copy on the 23d day of November, 1868, in the city of Davenport.

(Signed) G. W. CLARK,
U. S. Marshal.

Marshal's fees: Mileage, 180 miles, $10.80; service on 2, 4.00; 2 copies, 1.00—$15.80.

26 And on this day, to wit: the 30th day of October, in the October term, A. D. 1868, of said court, in the records of the proceedings thereof in said entitled cause, appears the following entry, to wit:

DAVID DOWS
vs.
THE CITY OF DAVENPORT & JOHN KAUFFMAN. } No. 93. Chancery.

This day this cause coming on to be heard on complainant's motion for a writ of injunction, and the court having heard the same, and being now sufficiently advised in the premises, sustain said motion, and order that an injunction issue upon complainant's giving bond in the sum of five hundred dollars, which was according' done, and approved in open court.

27 And on this day, to wit, the 30th day of October, in the October term, A. D. 1868, of said court, in the records of the proceedings thereof in said entitled cause, appears the following entry, to wit:

DAVID DOWS
vs.
THE CITY OF DAVENPORT AND JOHN KAUFFMAN. } No. 93. Equity.

Now, on this 30th day of October, A. D. 1868, being of the October term, came the said plaintiff, by Cook & Drury, his attorneys, and the motion coming up for hearing on the bill heretofore filed for an injunction, and it appearing that due notice had been given to the defendants of the making of said motion, and the said matters being duly considered:

It is ordered, that an injunction issue as prayed in said bill, upon the plaintiff giving bond, conditioned as required by law, in the sum of five hundred dollars, with B. F. Allen as surety.

28 And, on the 30th day of October, A. D. 1868, came said complainant, by his solicitors, and filed in said cause his injunction bond, which is in words and figures following, to wit:

Injunction bond.

Know all men by these presents that we, David Dows, of the city of New York, as principal, and B. F. Allen, of the county of Polk, State of Iowa, as sureties, are held and firmly bound unto the City of Davenport and John Kaufman in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, we do jointly and severally bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

The condition of the foregoing *of the foregoing* obligation is, that whereas, the above-bounden David Dows has filed a petition in the circuit court of the United States for the district of Iowa, praying, among other things, that a writ of injunction be issued to restrain the 29 said City of Davenport and John Kaufman from levying or collecting any tax for revenue purposes from the Chicago, Rock Island and Pacific Railroad Company:

Now, if the said David Dows, petitioner, shall pay to the aforesaid City of Davenport & John Kauffman, their heirs, executors, administrators, and assigns, all damages and costs which they may sustain, or that may be adjudged against him, as also all judgments that may be recovered against the said petitioner by reason of said injunction, then this obligation to be void, otherwise in full force and effect.

Witness our hands and seals this 30th day of October, A, D. 1868.

(Signed) DAVID DOWS, [SEAL.]
(Signed) By COOK & DRURY, [SEAL.]
His Att'ys.
(Signed) B. F. ALLEN. [SEAL.]

Accepted and approved by me.

SAM. F. MILLER, *Judge.*

(Endorsed:) Filed Oct. 30, 1868. W. G. Woodward, clerk.

30 And on said day, to wit, the 30th day of October, A. D. 1872, there issued out of said clerk's office a writ of injunction against said defendants, which said writ, with the marshal's return thereon, is in words & figures following, to wit:

United States circuit court of Iowa district, State of Iowa.

DAVID DOWS, PLAINTIFF,
against
THE CITY OF DAVENPORT AND JOHN KAUFFMAN, defendant.

To the defendant The City of Davenport and John Kauffman:

Whereas the plaintiff, David Dows, has filed his petition in the circuit court of United States, district of Iowa, praying, among other things, that you be restrained from levying or collecting any tax for revenue purposes from the Chicago, Rock Island and Pacific Railroad Company;

And whereas the said injunction has been ordered and allowed by the circuit court of the United States for the district of Iowa, on the filing of bond, which has been done:

31 Now, these are, in the name of the President of the United States, to command you, and each of you, the said City of Davenport and John Kauffman to forthwith restrain from collecting, or proceeding to collect, any tax for revenue purposes for the year 1868 from the Chicago, Rock Island and Pacific Railroad Company, or from

levying on or taking any property of said railroad company, with the purpose or intent of collecting said tax.

And this injunction you will observe under the penalty of the law.

Witness Salmon P. Chase, Chief Justice of the Supreme Court of the U. S. and the of the said circuit court, district of Iowa, at Des Moines, county of Polk, State of Iowa, this 30th day of October, 1868.

[SEAL.] (Signed) W. G. WOODWARD, *Clerk.*

32 *Marshal's return.*

UNITED STATES OF AMERICA,
District of Iowa:

I served this writ, on the 31st day of October, A. D. 1868, by reading the same personally to M. Donahue, the mayor of said city of Davenport, and to the said John Kauffman, marshal*l* of said city of Davenport, and by delivering to each of the said officers above named a true copy of this writ, to wit, in the city of Davenport, Scott County, Iowa.

(Signed) G. W. CLARK,
U. S. Marshal.

Marshal's fees: Mileage, $10.80; service on 2, 4.00; two copies, 1.00 —$15.80.

(Endorsed:) Filed May 4, 1869. George B. Corkhill, clerk.

33 And on the 30th day of December, A. D. 1868, came said defendants, and filed *at* said cause their demurrer to complainant's bill, which is in words and figures following, to wit:

In the circuit court of the United States for the district of Iowa.

DAVID DOWS, COMPL'T,
vs.
THE CITY OF DAVENPORT AND JOHN KAUFFMAN, defendants.
} In equity.

The demmurrers of John Kauffman one of the defendants above named, to the bill of complaint of David Dows.

The defendant, John Kauffman, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, for himself alone, does demur to the said bill, and, for cause of demurrer, shows that, it appears in said bill that he is improperly joined as a party defendant in said bill.

34 Wherefore, and for divers other errors and imperfections, this defendant humbly demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, or any of the matters or things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Signed) GEO. P. WHITCOMB,
Sol'r for the defendant John Kauffman.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

(Signed) GEO. P. WHITCOMB,
Of Counsel for the def't John Kauffman.

STATE OF IOWA, *Scott County, ss:*

I, John Kauffman, being duly sworn, say that I am the defendant, so named, in the above-entitled suit, and that the foregoing demurrer made by me is not interposed for the purpose of delay, but because the same is well founded in point of law, as I am advised and verily believe.

(Signed) JOHN KAUFFMAN.

Subscribed and sworn to before me, a notary public in and for
35 said county, as witness my hand and notarial seal, this 2d day of
December, 1868.

[NOTARIAL SEAL.] (Signed) GEO. P. WHITCOMB,
N. P., Scott Co., Iowa.

Endorsed:) Filed Dec. 30, 1868. George B. Corkhill, clerk.

36 And on the same day, to wit, the 30 day of December, A. D. 1868, came said defendants and filed, in said cause, their demurrer to complainant's bill, which is in words and figures following, to wit:

In the circuit court of the United States for the district of Iowa.

DAVID DOWS, COMPL'T,
vs.
THE CITY OF DAVENPORT AND JOHN KAUFFMAN, defendants.
} In equity.

The demurrers of the city of Davenport and John Kauffman to the bill of complaint of David Dows.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur to so much of said bill as prays that the said tax so
levied and assessed by the said city of Davenport may be declared
37 null and void, and that a temporary and a perpetual injunction may
be issued, commanding, restraining, &c., as set forth in the
prayer of said bill.

1. That the said relief prayed is sought for the benefit of the "Chicago, Rock Island and Pacific Railroad Company," the real person or party interested, as complainant, and a necessary party to said bill, although not made a party by complainant, nor a party thereto, and no sufficient reason appears or is shown why said company is not, or is not made, a party to said bill.

2. That this honorable court has no jurisdiction to grant the said relief sought, inasmuch as the same is for the benefit of the said Chicago, Rock Island & Pacific Railroad Company, a corporation and a citizen existing under and by virtue of the laws of Iowa, of the State of Iowa, and of the same State as these defendants are citizens.

3. That the jurisdiction of the matters involved in said relief sought belongs exclusively to the courts of the State of Iowa.

38 4. That the complainant has full, adequate, and complete remedy by action at law.

And therefore, and for other good causes of demurrer in the said bill contained, as to so much of the said complainant's bill as is demurred unto as aforesaid, these defendants do demand the judgment of this honorable court, whether they shall be compelled to make any answer to such part of the said bill as is so demurred unto as aforesaid, &c.

(Signed) GEORGE P. WHITCOMB,
Sol'r for Def'ts.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

(Signed) GEO. P. WHITCOMB.
Of Counsel for Defendants.

STATE OF IOWA, *Scott County, ss:*

O. S. McNeil and John Kauffman, each being duly sworn, severally say, the former, that he is acting mayor of the above-named defendant, the City of Davenport, and the latter, that he is the other defendant named, and is the city marshal of said city of Davenport, and 39 and they both say that the foregoing demurrer is not interposed for delay, but because the same is well-founded in point of law, as they are advised by counsel, and verily believe.

(Signed) O. S. McNEIL,
Mayor pro tem.
J. KAUFMAN.

Subscribed and sworn to before me, a notary public in and for said county, this 2d day of December, A. D. 1868, as witness my hand and notarial seal.

[NOTARIAL SEAL.] (Signed) GEO. P. WHITCOMB,
N. P., Scott Co., Iowa.

(Endorsed:) Filed Dec. 30, 1868, George B. Corkhill, clerk.

40 And on the same day, to wit, the 30th day of December, A. D. 1868, came said defendants and filed their demurrer to complainant's bill, which is in words and figures following, to wit:

In the circuit court of the United States for the district of Iowa.

DAVID DOWS COMP'T.
vs.
THE CITY OF DAVENPORT AND JOHN KAUFMAN, defendants.
} In equity.

The demurrer of City of Davenport and John Kaufman to the bill of complaint of David Dows.

The defendants by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill, to be true in such manner and form as the same are therein set forth and alleged, demur to all that part of said bill, commencing with the words, "Your orator represents and respectfully insists that the said Chicago, Rock Island and Pacific Railroad Company is not liable to the 41 payment," &c., on the eighth (8th) page thereof, and ending with the words "it can only be taxed through and upon the shares of its stockholders," on the 12th page thereof, and for causes of demurrer show:

1. That by the laws of Iowa the said City of Davenport has full power

and authority to levy and collect taxes for revenue purposes, upon all he property of the said Chicago, Rock Island and Pacific Railroad Company, which has been so assessed by the assessor of said City of Davenport as set forth on pages six and seven of said bill.

2. That the said alleged act of the general assembly of the State of Iowa, passed on the 8th of April, A. D. 1862, referred to on page eighth of said bill, and the said act passed on the 8th April, 1868, referred to on page 10th of said bill, are each contrary to and against the constitution of the State of Iowa, (adopted September 3d, 1857,) and particularly section 6th of article one, and sections twenty-nine and thirty of article three, and section two of article eight.

42 3. That the two aforesaid acts of the said general assembly have no application or reference to the taxation of said railroad property (so assessed as stated in complainant's bill) for municipal revenue purposes, as authorized in the charter of said city of Davenport, but only to taxation for State and county revenue purposes, under the general revenue laws of the State of Iowa.

4. That by the laws of the State of Iowa the property of said railroad company so assessed as stated in said bill is taxable, not through or upon the shares of its stockholders, but as real property, and that this is especially so as to the manner of its taxation by the city of Davenport.

5. That said treasurer of the State of Iowa has no power or authority by law to levy said tax of one per centum on the road-bed, track, rolling-stock, and depot grounds, which contain the necessary buildings for operating said railroad as set forth on page 10th of said bill,
43 but only, if at all, upon the gross receipts of said railroad company.

Wherefore, and for divers other errors and imperfections appearing in the said bill, these defendants humbly pray the judgment of this honorable court whether they shall be compelled to make any answer to such part of the said bill as is so demurred unto as aforesaid, &c.

(Signed) GEO. P. WHITCOMB,
Sol'r for defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

(Signed) GEO. P. WHITCOMB,
Of Counsel for Def'ts.

THE STATE OF IOWA, *Scott County, ss:*

O. S. McNeil and John Kauffmann, each being duly sworn, severally say, the former that he is the acting mayor of the foregoing named defendant, The City of Davenport, and the latter that he is the other defendant named, and is the city marshal of said city of Davenport, and they both say that the foregoing demurrer is not interposed for
44 delay, but because the same is well founded in point of law as they verily believe.

(Signed) O. S. McNEIL,
Mayor pro tem.
J. KAUFMAN.

Subscribed and sworn before me, a notary public in aforesaid county this 2d day of December, A. D. 1868, as witness my hand and notarial seal.

(Signed) GEO. P. WHITCOMB,
N. P., Scott Co., Iowa.

(Endorsed:) Filed Dec. 30, 1868. George B. Corkhill, clerk.

45 And on the 14th day of May, 1869, the said parties by their att'ys file in said cause their stipulation, which is in words & figures following, to wit:

In the circuit court of the United States.

David Dows
vs.
John Kauffman, marshal, and The City of Davenport. } In chancery.

It is hereby stipulated and agreed that the above-stated cause be continued until the next term of said court.

May 10th, 1869.
(Signed) COOK & DRURY,
Sol. for Comp't.
J. D. CAMPBELL,
Solicitor for Defendants.

(Endorsed:) Filed May 14, 1869. (Signed) George B. Corkhill, clerk.

46 And on this day, to wit, the 14th day of May, in the May term, A. D. 1869, of said court, in the records of the proceedings thereof in said entitled cause appears the following entry, to wit:

David Dows
vs.
The City of Davenport and J. Kauffman. } No. 93. In chancery.

This cause coming on for hearing was continued as per stipulation on file.

47 And on this day, to wit, the 2d day of November, in the October term, A. D. 1869, of said court, in the records of the proceedings thereof in said entitled cause appears the following entry, to wit:

David Dows
vs.
The City of Davenport & John Kauffman. } No. 93. Equity.

And now on this 2d day of November, A. D. 1869, this cause came on to be heard upon the demurrer of said defendant, and after arguments of the solicitors of both parties, and the court being full' advised in the premises doth now here overrule said demurrer.

Whereupon the respondents refusing to answer over, the court finds the equities, and order, adjudge and decree that said injunction be made perpetual; that the said city of Davenport and the said John Kauffman, and all other officers of said corporation do absolutely desist and refrain from levying, assessing, or collecting any tax from the said Chicago, 48 Rock Island and Pacific Railroad Company mentioned in the bill in this case, and that said respondents be perpetually enjoined and restrained from so doing. And it is further ordered and decreed that complainant have and recover his costs in this behalf expended taxed at , and that execution issue therefor.

And it is further ordered that respondents have thirty days to perfect their appeal in case they desire to appeal.

49 On the 16th day of May, A. D. 1872, came the said defendants,
by Jno. N. Rogers, esq., and filed in said clerk's office their petition for allowance of appeal, in said cause, which is in words and figures following to wit:

In the circuit court of the United States for the district of Iowa.

DAVID DOWS
vs.
THE CITY OF DAVENPORT AND JOHN KAUFMAN, marshal of said city.
} No. 93. In equity.

To the honorable the judges of said circuit court:

Your petitioners, The City of Davenport, a municipal corporation created by the laws of the State of Iowa, and John Kaufman, a citizen of said State, defendants in the above-entitled cause, respectfully represent that the said David Dows filed his bill in equity in the said cause, in the said circuit court against your petitioners as defendants,
on or about the 28th day of October, A. D. 1868, alleg-
50 ing therein that he was a citizen of the State of New York,
and a stockholder in the Chicago, Rock Island & Pacific Railroad Company, a corporation for pecuniary profit, organized under the laws of the State of Iowa, and filing his said bill as well on behalf of himself as of all the stockholders in said corporation, citizens of others of the United States than the State of Iowa, and praying for a decree perpetually *ad*joining the said City of Davenport and said John Kaufman, the city marshal thereof, from collecting or enforcing payment of certain taxes thereon alleged to have been levied by said city in said year 1868, on the property of the said railroad company, which was situated in their said city, and which said taxes were alleged in said bill to amount to the sum of twenty-six hundred dollars.

That your petitioners appeared and filed respectively their demurrers
to said bill; and that afterwards, at a term of said court began &
51 held at Des Moines, on the third Tuesday of October, A. D. 1869,
to wit, on the second day of November, 1869, the said demurrers came on to be argued before the said court, and were then and there by the said court overruled; and your petitioners declining to answer said bill, it was then and there finally decreed by the said court that your petitioners be and they were thereby perpetually enjoined and restrained from enforcing payment of or collecting the said taxes as aforesaid, all of which by reference to said decree of record in said court will more fully appear.

Your petitioners further represent that they are advised and believe that the said decree is erroneous and contrary to equity, and operates to the manifest wrong and injury of your petitioners.

They therefore pray an appeal therefrom to the Supreme Court of the United States, and that the same may be by your honor allowed, to the
end that the same being brought before the said Supreme Court,
52 that may be done in respect thereto, which of right and justice
ought to be done. And your petitioners as in duty bound will ever pray, &c.

(Signed) THE CITY OF DAVENPORT &
JOHN KAUFMANN, *Petitioners.*
By JOHN N. ROGERS, *Their Solicitor.*

UNITED STATES OF AMERICA,
District of Iowa, ss:

John C. Bills, being duly sworn, says that he is mayor of the City of Davenport, petitioners in the foregoing petition, and that the matters set forth in said petition are true, as he verily believes.

(Signed) JOHN C. BIL'S,
Mayor of Davenport.

Subscribed and sworn to this 11th day of March, 1872, before me.
[NOTARIAL SEAL.] (Signed) CHA'S E. PUTNAM,
Notary Public.

(Endorsed:) Filed May 16, 1872. George B. Corkhill, clerk.

53 And on this day, to wit, the 16th day of May, in the May term, A. D. 1872, of said court, in the records of the proceedings thereof in said entitled cause appears the following entry, to wit:

DAVID DOWS
vs.
THE CITY OF DAVENPORT AND JOHN KAUFMAN, marshal of said city.
No. 93. Equity.

The defendant' in the above-entitled cause, by John N. Rogers, their solicitor, and filing their petition for the allowance of their appeal to the Supreme Court of the United States from the decree rendered herein by this court in favor of the complainant at the October term, A. D. 1869, it is ordered thereupon, that said appeal be and the same is hereby allowed, and said defendants now here presenting an appeal-bond for approval signed by George S. Shaw and Thomas T. Dow, the same is approved and ordered to be filed.

54 And on the said 16 day of May said defendants filed in said clerk's office their appeal-bond, which is in the words and figures following, to-wit:

Know all men by these presents, that we, George S. Shaw and Thomas T. Dow, of the city of Davenport, in the county of Scott, and the State of Iowa, are held and firmly bound unto David Dows, of the city, county, and State of New York, in the sum of five hundred dollars to be paid to the said David Dows, his executors or administrators, for which payment well and truly to be made, we bind ourselves firmly by these presents; yet on this condition, that whereas the City of Davenport and John Kaufman, marshal thereof, have appealed to the Supreme Court of the United States from the decree of the circuit court of the United States for the district of Iowa, rendered in a certain cause in equity in said circuit court, between the said David 55 Dows, complainant, and the said city of Davenport, and John Kaufman, respondents, to reverse the said decree:

Now, if the said City of Davenport and John Kaufman shall prosecute their said appeal to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise in full force. Dated May 16th A. D. 1872.

(Signed) GEORGE S. SHAW.
THO'S T. DOW.

Approved May 16, 1872.

JNO. F. DILLON, *Judge.*

(Endorsed:) Filed May 16, 1872. George B. Corkhill, clerk.

56 Circuit court of the United States, district of Iowa.

DAVID DOWS
vs.
THE CITY OF DAVENPORT & JOHN KAUFMAN, marshal of said city. } In equity.

UNITED STATES OF AMERICA, *ss :*

To the said David Dows and his solicitors:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to an appeal taken by the said defendants in the above entitled cause from the decree rendered therein and allowed by the said circuit court, to show cause, if any you have, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. John F. Dillon, one of the judges of the said circuit court, this 16th day of May, A. D. 1872.

JNO. F. DILLON.

Service of this notice, with copy, admitted this 23d day of May, 1872, at Davenport, Iowa.

COOK, RICHMAN & BRUNING,
Successors of Cook & Dewey, Solicitors for David Dows.

(Indorsed:) 93 equity. U. S. circuit court, district of Iowa. David Dows vs. The City of Davenport & al. Citation on appeal. Filed May 16, 1872. George B. Corkhill, clerk. J. N. Rogers, sol'r for app'ts.

57 Circuit court of the United States, district of Iowa.

I, George B. Corkhill, clerk of said court for said district, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all pleadings and record entries, also copy of the appeal bond and the original citation with service thereon, in a certain cause wherein David Dows was complainant, and The City of Davenport and JohnKaufmann were defendants, as full, true, and complete as the original of the same now remain on file and of record in my office and under my control.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at my office, in Des Moines, in said district, this 2nd day of August, A. D. 1872.

[SEAL.[GEORGE B. CORKHILL,
Clerk U. S. C. C. Dist. of Iowa.

Costs trans. $14.35; express ch'g's 1.50--15.85.

(Indorsement on cover:) No. 405. The City of Davenport and John Kaufman, marshal of said city, appellants, vs. David Dows. Iowa C. C. U. S. Filed 6th August, 1872.

○

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE CITY OF DAVENPORT AND
JOHN KAUFFMAN, MARSHAL OF
SAID CITY,
Appellants.
vs.
DAVID DOWS,
Appellee.

(No. 190.)

Appeal from the U. S. Circuit Court for the District of Iowa.

ABSTRACT AND ARGUMENT FOR APPELLANTS.

JOHN N. ROGERS,
COUNSEL FOR APPELLANTS.

Globe Steam Printing Company, Davenport, Iowa.

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE CITY OF DAVENPORT AND
JOHN KAUFFMAN, Marshal of
said City,
Appellants.
vs.
DAVID DOWS,
Appellee.

(No. 190.)

Appeal from the U. S. Circuit Court for the District of Iowa.

Abstract and Argument for Appellants.

JOHN N. ROGERS,
Counsel for Appellants.

ABSTRACT.

Dows, the appellee, a citizen of New York, filed his bill in the court below, Oct. 28th, 1868, "in behalf of himself and all other non-resident citizens of the State of Iowa, stockholders in the Chicago, Rock Island & Pacific Railroad Company," against the city of Davenport, in the State of Iowa, and John Kauffman, marshal of said city.

The bill alleges that complainant owns 500 shares of the stock of said R. R. Co., worth at least $53,000. That said R. R. Co. is a corporation organized under the laws of Iowa, in 1866, for constructing and operating a railroad from the eastern boundary of Iowa, at said city, across said State to Council Bluffs. That its capital stock amounts to $14,000,000, most of which is owned by non-residents of Iowa. That at the time of filing the bill its road was completed and in operation for 225 miles west from the eastern boundary of Iowa. That the said city of Davenport, a municipal corporation created by law, of the State of Iowa, claims the right to tax the property of said company situated within its limits, and has caused to be assessed by the city assessor the depot grounds and buildings thereon, valued at $150,000, and also the railway track, side track, switches and road-bed within the city — about two miles — valued at $50,000; also the north half of the railroad bridge crossing the Mississippi river inside the city limits, valued at $125,000; that the city has levied a tax for city revenue upon said property of $2600, and authorized defendant Kauffman, the city marshal, to collect it; and that said marshal has served a notice on said company, dated June 17, 1868, that its city tax for the year 1868 is due, and amounts to $2600 and costs, and unless it is paid within twenty days the company's property will be subject to levy and sale for the amount of said tax; that said marshal threatens to levy on and take possession of the engines, cars, etc., of said company to satisfy said tax.

Complainant insists that said company is not liable to be taxed by said city, and that said levy and assessment are void, and in support of such claim refers to a statute of Iowa, passed April 8th, 1862 (for which see Laws of Iowa, 1862, chap. 173, pp. 223–228), by the 16th section of which (p. 227) it is provided that each railroad company in the State shall annually furnish to the State Treasurer a sworn statement of the gross receipts of its road for the preceding year; that the State Treasurer shall levy on said gross receipts a tax of one per cent., which said companies shall pay on or before February 15th; that one-half of said taxes shall be equally apportioned by the State Treasurer to the said counties through which the said roads respectively run, in proportion to the number of miles of track in each county, and shall be paid over to the county treasurer; that "the tax herein provided for shall be in lieu of all taxes for any and all purposes on the road-bed, track, rolling stock and necessary buildings for operating their road."

Reference is also made to another act passed April 8th, 1868 (Laws of Iowa, 1868, chap. 196, p. 281), repealing section 16 of said act of 1862, but re-enacting its provisions, with unimportant amendments.

Complainant further avers that said C., R. I. & P. R. R. Co., ever since its existence, has annually made the statement and paid to the State Treasurer the tax of one per cent. on its gross receipts, required by said acts; that said company, as a corporation, has refused and neglected to take action to arrest the payment or collection of said tax so levied by the city of Davenport, and, therefore, complainant, in behalf of himself and other non-resident stockholders, has to file this bill to prevent such collection.

The bill prays a decree setting aside and declaring void said tax so levied by said city, and perpetually enjoining its collection, and that in the meantime a temporary injunction issue.

A copy of the assessment complained of is annexed to the bill.

Oct. 30, 1868.—A temporary injunction was ordered as prayed, and issued accordingly.

Dec. 30, 1868.—Defendants demurred "to so much of said bill as prays that the said tax so levied and assessed by the said city of Davenport may be declared null and void, and that a temporary and perpetual injunction may be issued," etc., for the following causes:

First.—That the railroad company is the real party interested as complainant, and a necessary party to the bill, but not made a party, nor any reason shown why it is not made a party.

Second.—That the court has no jurisdiction to grant the relief sought, it being for the benefit of the railroad company, a corporation existing under and by virtue of the laws of Iowa, and of the same State of which defendants are citizens.

Third.—That the jurisdiction of the matters involved in said relief sought belongs exclusively to the courts of the State of Iowa.

Fourth.—That the complainant has full, adequate and complete remedy by action at law.

Defendants at the same time further demurred "to all of that part of said bill commencing with the words, 'Your orator represents and respectfully insists that the said C., R. I. & P. R. R. Co. is not liable to the payment,' etc., on the 8th page thereof, and ending with the words, 'It can only be taxed through and upon the shares of its stockholders,' on the 12th page thereof," (embracing that part of the bill setting forth the grounds on which the tax is claimed to be illegal) for the following causes, viz.:

First.—That by the laws of Iowa the said city has full power and authority to levy and collect taxes for revenue purposes on all the property of said railroad company which has been assessed, as set forth in the bill.

Second.—That the acts of the Legislature of Iowa, of April 8th, 1862, and April 8th, 1868, referred to in the bill, are contrary to the constitution of Iowa, particularly to sec. 6, art. 1; sec's. 29 and 30, art. 3, and sec. 2, art. 8, thereof.

Third.—That said acts of the Legislature, of 1862 and 1868, have no application or reference to the taxation of said railroad for municipal revenue purposes, as authorized in the charter of the city of Davenport, but only to taxation for State and county purposes, under the general revenue laws of the State of Iowa.

Fourth.—That, by the laws of Iowa, the said property of said railroad company is taxable, not through and upon the shares of its stockholders, but as real property, and that this is especially so as to the manner of its taxation by the city of Davenport.

Fifth.—That the Treasurer of the State of Iowa has no authority to levy said tax of one per cent. on the road-bed, track, rolling stock and depot grounds of the railroad company, but only, if at all, upon the gross receipts of said company.

At the same time the defendant Kauffman separately demurred to the bill, on the ground that he was improperly made a party thereto.

On argument, the demurrers were overruled, and defendants declining to answer, a final decree was rendered, Nov. 2, 1869, perpetually enjoining defendants "from levying, assessing or collecting any tax from the said C., R. I. & P. R. R. Company mentioned in the bill in this case."

From this decree defendants appeal.

ASSIGNMENT OF ERRORS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1873.

THE CITY OF DAVENPORT AND JOHN KAUFFMAN, MARSHAL OF SAID CITY, *Appellants.* *vs.* DAVID DOWS, *Appellee.*	(No. 190.)

Appeal from the U. S. Circuit Court, District of Iowa.

The appellants assign the following as errors in the rulings and decisions of the said Circuit Court in said cause, to wit:

I.

The said Circuit Court erred in overruling the defendants' demurrers to the bill, for the following reasons, to wit:

First.—Because the Chicago, Rock Island & Pacific Railroad Company was not made a party to the bill.

Second.—Because the complainant had a full, adequate and complete remedy at law.

Third.—Because, by the laws of Iowa, the said city of Davenport had full power and authority to levy and collect the tax set forth in the bill.

II.

The said Circuit Court erred in rendering a decree perpetually enjoining and restraining the defendants from collecting the tax set forth in the bill, and in not rendering a decree dismissing the bill; for the same reasons hereinbefore stated as reasons why said court erred in overruling the demurrers to the bill.

JOHN N. ROGERS,
Counsel for Appellants.

ARGUMENT.

It is submitted that the decree below is erroneous and must be reversed, for the three following reasons:

I.

The Chicago, Rock Island & Pacific R. R. Co. was a *necessary party to the suit.*

The bill is filed by Dows, as a stockholder in the company, asking relief for and on behalf of the company, on the ground of the neglect and refusal of the company to bring suit itself.

The decree is precisely such a decree as would have been rendered in favor of the corporation in a suit instituted by it as complainant. No relief to the complainant, individually, is asked for by the bill, nor granted by the decree.

Such a suit by a stockholder may, perhaps, be maintained when necessary to the protection of the corporate rights, but never without making the corporation a party. The parties against whom relief is sought are entitled to have the proceedings so conducted that any decree made on the merits shall *conclude the corporation*, and not leave them exposed to be called to account by it again for the same matters in another suit. This can only be accomplished by making the corporation a party to the stockholders' bill, which has several times been expressly held to be indispensable in such a suit.

Robinson vs. Smith, 3 Paige, 222, 233.
Cunningham vs. Pell, 5 ib., 607.
Hersey vs. Veazie, 24 Me., 1.
Charles Ins. & T. Co. vs. Sebring, 5 Rich. (S. C.) Eq. 342.
Western R. R. Co. vs. Nolan, 48 N. Y., 513.
Bagshaw vs. East. Un. R. R. Co., 7 Hare, 114, 131.

And it is believed that no case can be found in which such a suit has been maintained without making the corporation a party.

In *Dodge* v. *Woolsey*, 18 How, 331 (the case chiefly relied on as authority for this suit), not only was the bank, whose rights were sought to be vindicated, made a party defendant, but its individual directors were also joined. Mr. Justice Campbell, in his dissenting opinion, says (pp. 365–6): "Nor can this jurisdiction be supported by affirming that the corporation is not a necessary party to the bill. The subject of the bill is the title of the corporation to exemption under the act of incorporation, and its object is the protection of corporate franchises and property. The being of the corporation is charged to be an issue involved in the prayer for relief, and the inaction of the directors affords the motive for the suit. The conduct of the directors was determined in the course of their duty as the governing body of the corporation, under the law of their organization. Their measures and judgments were the acts of the corporation. Whether these were conclusive upon the corporators, or whether they might be impeached at the suit of a single dissenting shareholder; whether the relations between the State and the corporation were to be settled in a suit between them or in this suit, are the matters in issue, and the corporation was an essential party to their adjudication. The principle of the bill is, that in declining to take effective measures of prevention — that is, refusing to apply for an injunction — the directors abdicated their controlling powers, and any stockholder became entitled to intervene for the interests of himself and his associates. The decree in this cause is not a decree for the relief of this corporator, but is a decree for the corporation, and does not differ from a decree proper to a case of the corporation against the treasurer. It is clear, therefore, that the corporation was a necessary party to the bill, and so are the adjudged cases."

Nothing opposed to these views is to be found in the opinion of the majority of the court. Mr. Justice Campbell and the other judges who concurred with him (Daniel and Catron, JJ.), were of opinion that the bank being necessarily made a defendant, and the complainant alleging himself to be a stockholder in it, and grounding his right to sue on that allegation, the conditions as to citizenship of the parties were not fulfilled so as to confer jurisdiction on the U. S. Circuit Court. (See pp. 364–366.)

In this view, however, the court did not concur, but expressly sustained the jurisdiction. It follows that in the present case no obstacle whatever existed to making the railroad company a party defendant; and it is impossible to conjecture what could have been the motive for omitting to do so, unless complainant was unwilling to subject the company to the hazard of an adverse decree which would conclude it. If such were the object, it has doubtless been attained; at least in the absence of extrinsic evidence showing that the suit has really been prosecuted by the company in the name of its stockholder.

II.

Since the decree below was rendered, this court has decided in *Dows vs. Chicago*, 11 Wall., 108, that a suit in equity will not lie to restrain the collection of a tax on the sole ground of its illegality.

The same thing was again held in Hahnewinkle vs. Georgetown, 15 Wall., 547, and applied to the case of an illegal tax on *real* property; from which it appears that not every such tax creates a cloud on title which equity will interpose to remove.

Nothing but the mere illegality of the tax — an illegality, if any, apparent on its face — is set up by complainant in this case as a ground for relief against it. Neither of the circumstances which, added to the illegality of the tax, it is intimated in the cases just cited, would warrant the interposition of equity; neither exposure to multiplicity of suits, nor to irreparable injury, nor a cloud upon title, nor anything else, is urged as a reason for granting the injunction.

If, therefore, the railroad company were itself the complainant, these decisions would be conclusive authorities against it; and they must be equally so against the present complainant, unless a stockholder can maintain a suit for and on behalf of the corporation which the corporation itself could not maintain.

But it may be urged for complainant, that the decision in Dodge vs. Woolsey entitles the stockholder to sue, on showing the neglect and refusal of the corporation to do so; and that the stockholder must sue. if at all, in equity.

The answer to this is, that Dodge vs. Woolsey is controlled by the later decisions in Dows vs. Chicago, and Hahnewinkle vs. Georgetown; and that in the light of these latter cases, no such decree as was made in the former would now be upheld.

The sole ground on which the stockholder is permitted, by that case and every other on the subject, to sue on behalf of the corporation, is that the corporate officers, who control its action, have failed in their duty, and have refused to take the steps which they ought to have taken for the vindication of the corporate rights. But of *what* failure in duty is it alleged in this case, as in Dodge vs. Woolsey, that the corporate officers have been guilty, by reason of which the right to interfere devolved on the stockholder? Simply of not having done what this court has decided in Dows vs. Chicago that they could not have effectually done. viz: brought a suit in equity to restrain the collection of the tax. The allegation of neglect, it is true, may be in broader and more general terms than this. But from the nature of the case this is all they *could* have done. It is not alleged that the city, at the time of bringing the suit, had done anything, beyond serving a demand of payment, towards collection of the tax. It is not claimed that the marshal had seized the railroad company's property, and that the company had neglected to replevy it; nor that he had collected the money, and the corporate officers refused to institute suit to recover it back. When either of these things is made to appear it will be time enough to invoke the doctrine of Dodge vs. Woolsey, as modified by Dows vs. Chicago, in aid of a suit in equity by a stockholder. As the case stands, no default whatever is shown on the part of the corporate officers. They appear to have been waiting, like prudent men, for a cause of action to accrue before suing; and complainant's suit is, therefore, an officious and unauthorized interference.

The rule established in Dows vs. Chicago will be found of little moment or value if it can be evaded by the easy device of substituting the name of a stockholder for that of the corporation, as party complainant on the record.

See the late case of Western Railroad Company vs. Nolan, 48 N. Y., 513.

III.

Finally, as to the merits; the liability of the railroad company to the taxation complained of has been settled by the Supreme Court of Iowa in a decision also made since the decree below.

Dunleith & Dubuque Bridge Co., vs. City of Dubuque, 32 Io., 427.

The claim on the part of the company is, that the provisions of section 16 of the act of April 8th, 1862, and the subsequent act of April 8th, 1868 (stated in the abstract) by which railroad companies are required to pay to the state treasurer annually a tax of one per cent. of their gross earnings, part of which is to go to the state and the remainder to the counties through which the roads respectively run, which tax "shall be in lieu of all taxes for any and all purposes on the road-bed, track, rolling-stock, and necessary buildings for operating their road," exempt the companies from taxation *by incorporated cities or towns,* for municipal purposes, upon their property therein situate.

It is held in the case just cited, that this position is unfounded; that the one per cent. tax is only in lieu of all *state and county* taxes, and does not interfere with the power of a municipal corporation to tax railroad property within its limits, when authorized to do so by the terms of its charter.

It was further held, that the city of Dubuque had been empowered by the legislature to tax the property of railroad companies situate within its limits. The court say. "By its charter, it" (*i. e.* the city) "is authorized to levy and collect taxes upon '*all taxable property*' *within its limits*. The depots, tracks, real estate, etc., etc., of railroad corporations are property. Section 711 of the Revision prescribes what property shall be exempt from taxation. The property of railroads is not included therein. Section 712 declares that all other property, real and personal, within the state, and not exempt by section 711, is subject to taxation. It thus clearly appears that the property of railroads is '*taxable property*.' But section 712 also explicitly declares that all property of incorporated companies is subject to taxation, and the constitution, article 8, section 2, declares that 'the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals, with these additional statutory and constitutional declarations, it seems to us that there can be no doubt upon the question. The property of railroads being taxable, the city of Dubuque, under the express power to assess all taxable property, is lawfully empowered to levy taxes thereon." 32 Iowa, 430.

This decision is applicable in all its force to the question between the city of Davenport and the C., R. I. & P. R. R. Co. The charter of Davenport, like that of Dubuque, grants the power "to levy and collect taxes upon all taxable property, real, personal, and mixed, within the city, not exceeding," &c.

Laws of Iowa, 1850–51, Chap. 55, Art. 5, Sec. 1, p. 114.

We do not think it necessary or proper, in view of this authoritative decision by the highest tribunal of the State, of a question depending entirely on the interpretation of the State constitution and statutes, to argue the point here *de novo*. By every rule which has governed this court in similar cases, the interpretation adopted by the State court must prevail here. The case cannot be claimed to be one of those extraordinary and exceptional ones in which this court has felt called on to refuse to follow the State decisions. "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." *Leffingwell* v. *Warren*, 2 Black., 603.

The point had never been decided in the Supreme Court of Iowa until the decision in 32 Iowa, already cited. In two former cases the court had been equally divided upon it.

City of Davenport vs. M. & M. R. R. Co , 16 Ia., 348.
Dubuque & S. C. R. R. Co. vs. City of Dubuque, 17 Io., 120.

In the case in 16 Iowa two eminent judges, not now members of the court (Mr. Justice Wright, now representing Iowa in the U. S. Senate, and Mr. Justice Dillon, now U. S. Circuit Judge for the Eighth Circuit), concurred in the views which ultimately prevailed in the court.

If the decision in 32 Iowa had been made prior to the decision of this case below, beyond a doubt the Circuit Court would have followed it.

It is respectfully submitted that on these several grounds the decree below should be reversed, and the cause remanded with instructions to dismiss the bill.

JOHN N. ROGERS,
Counsel for Appellant.

REPLY TO ARGUMENT FOR APPELLEE.

Since the foregoing was printed, the argument on the other side has been received, and a few pages will be added, by way of reply thereto.

I.

Although the learned counsel denies "that the law of the state of Iowa relating to the taxation of railroad property by municipal corporations is *settled*, or ever has been, as asserted by the counsel for the appellant," he does *not* deny that the precise question of the legality of the tax in question in this case, was decided by the Supreme Court of Iowa, in the Dubuque case, 32 Iowa, 427, in favor of the validity of the tax; nor does he claim that the point has ever been decided otherwise in that court.

A few words seem called for to dispel the fog in which the subject is enveloped by the learned counsel's history of railroad taxation in Iowa, and to put its real situation as declared by the state court, in a clear light.

The several railroad tax-acts referred to in the opposing argument (pp. 3–5), were parts of the general revenue law of the state. They provided for the *mode* of taxing railroad property for *state* and *county* purposes, and for no other. It was not under those laws, nor any of them, that the powers of the *incorporated cities* of the state to tax railroad property within their respective limits, for local municipal purposes, was derived. *Such* power, where it exists, is conferred by the respective *city charters*, and is governed and limited only by their terms. The state revenue law has no bearing or influence on such taxation, except in so far as it recognizes railroad property as *taxable* property; *i. e.*, excludes it from the classes of property *exempted* from taxation.

Thus, the charter of Dubuque authorizes the city council (among other things): "23d. To collect taxes to defray the current expenditure, and pay the debts of the city, provided that the tax for any one year shall not exceed one per cent. upon the assessed value of all property taxed. 24th. To provide for the assessment of *all taxable property in said city*, with reference to taxation for city purposes." (Laws of Iowa, 1856–7, chap. 210, p. 349).

In like manner, the charter of Davenport provides that "The city council shall have power and authority to levy and collect taxes upon *all taxable property*, real, personal and mixed, *within the city*, not exceeding one half per cent. per annum upon the assessed value thereof, which value shall be ascertained by the assessor of said city." (Laws of Iowa, 1850–51, Chap. 55, p. 114, Art. 5, Sec. 1).

It is under these enactments that the powers of these cities to tax railroad property, or *any* property, are derived; and plainly, all property, of whatever kind, which is taxed under this authority, must be taxed in the same way, viz.: by a uniform rate or per centage (not exceeding the limit fixed by the charter) upon its assessed valuation.

To ascertain, then, whether these cities can tax *railroad* property, equally with other property within their limits, reference must be had to the constitution and laws of the state, to see whether such property is "taxable;" *i. e.*, whether it is not *exempted* from taxation; and when it is found that it is not merely *not* exempted, but expressly declared to be *subject* to taxation, nothing is wanting to make out the power to tax under the city charters.

But it was contended that this power was taken away by the provision of the acts of 1862–1870, that the per centage on the gross earnings of railroad companies, required thereby to be paid annually to the state, should be "in lieu of all taxes for any and all purposes," &c. This objection is answered by the decision that the "taxes for any and all purposes" include only *state* and *county* taxes "for any and all purposes," and that the taxing power of municipal corporations, under their charters, is not taken away or affected thereby.

Such was the state of the law prior to 1872, as declared by the Supreme Court of Iowa, in the Dubuque case, 32 Iowa, 427, approving and following the opinion of Justices Dillon and Wright, 16 Iowa, 365–9 (City of Davenport vs. M. & M. R. R. Co).

The learned counsel is in error in his statement (pp. 4–5) of the last mentioned case. The decision below, which was affirmed in the Supreme Court on equal division, was *in favor* of the taxing power as to the real estate, track, &c., of the railroad company; not adverse to it, as stated by him.

It is not proposed here to enter upon a vindication of the propriety and soundness of the decision in 32 Iowa. The question decided, as heretofore observed, was purely one of *interpretation* of the state constitution and statutes. It belongs to a class of cases in which the federal courts implicitly follow the state tribunals. At this very term, in *U. S. ex. rel. Reynolds vs. Supervisors of Carroll County*, this court has held itself bound to follow, upon such a question, decisions of the Supreme Court of Iowa, which, in *Butz vs. Muscatine*, 8 Wall., 575, it had pointedly disapproved and refused to apply to prior contracts. Nor is it necessary that there should have been a *uniform series* of state decisions, to constitute a rule for this court. If there have been conflicting decisions, this court will follow "the latest settled adjudications" (*Leffingwell vs. Warren*, 2 Black., 599). In this case there is no such conflict; and though the state court, as constituted in 1864, divided on the question, it is worthy of remark, that of the seven judges who have sat in the various cases which have brought it before the court for determination, *two* only (Justices Lowe and Cole) have held views opposed to the ultimate decision.

As to the supposed influence of the act of 1872, on the authority of the decision in 32 Iowa, it is enough to say, 1st. That the legislature has no power to overrule judicial decisions construing the law as to the past, but can only make new law for the future; and 2d. That the Iowa legislature has not, by the act in question, undertaken to exercise any such power. Recognizing the validity of taxes such as that now in question, imposed prior to 1872, it simply undertakes to *release* them on certain conditions, and subject to certain exceptions. The effect of this act, regarded as a *release*, upon this case, will be presently considered.

II.

But the main reliance, to sustain the decree below, is evidently placed upon the supposed *ex post facto* operation of Sec. 9, of the Act of 1872, in *releasing* the tax (p. 7, Subdiv. 2). This branch of the argument necessarily takes the position, that though the tax was legal and valid, and the decree enjoining its collection on the ground of illegality, *with costs against the city*, was utterly erroneous when rendered, it is cured by a subsequent statute releasing the tax enjoined, and must on that ground be *affirmed* on appeal For this, the *Clinton Bridge case*, 10 Wall., 454, *Exparte McCardle*, 7 Wall., 514, *Norris vs. Crocker*, 13 How., 429, and *Insurance Co. vs. Ritchie*, 5 Wall., 541, are cited.

But does it follow, because statutes taking away the jurisdiction of the court, or the cause of action, *defeat* suits pending at the time of their passage, that a decree enjoining the collection of a tax on the sole ground of its illegality, when no illegality existed, and when if it had existed it would have afforded no ground for an injunction, can be rendered impregnable on appeal by a subsequent act releasing the tax?

This argument ignores entirely points I. and II. of the argument of appellants, based on defect of parties, and want of equity in the bill. The counsel says (p. 7), "If the case were now pending in the court below, it would be the duty of the court to make the decree now under review." We emphatically deny that such would be the case, even on an amended bill based on the act of 1872, much less on the present bill.

But let it not be supposed that we are seeking merely the barren victory of a reversal of this decree. The *validity* of the act of 1872 is open to very serious question on the ground of its conflict with several clauses of the Iowa constitution, especially Art. 8, Sec. 2, viz.: "The property of corporations for pecuniary profit shall be subject to taxation, *the same as that of individuals.*"

This question is now being actively litigated in the courts of Iowa, which are not only the proper tribunals for its determination, but the *only* ones having jurisdiction of suits between the parties to the controversy; *i. e.*, the cities and the railway corporations of the state. It is now pending, undetermined, in the State Supreme Court, in a suit between the City of Davenport and the Chicago, Rock Island & Pacific Railroad Co., as well as between other parties. That court has had the question under advisement since last April, from which some inference may be drawn as to its gravity, in their view; and the present writer, as counsel for the city of Davenport, has recently had the task of replying to an argument of 80 pages length, by his brother Withrow, chiefly devoted to an effort to sustain the constitutionality of the law, from which it seems not unfair to surmise that the learned counsel regards the point as not entirely free from difficulty.

The bearing of this case upon the litigation just referred to, will be seen in a moment. This decree, while it stands, affirms the *original illegality* of the tax; and in the city's suit in the state court, to recover this and other years' taxes on the same property, all standing on the same footing, this decree is made the basis of a plea of former adjudication, and is claimed to estop the city from asserting the *original legality* of the taxes, and to bar it from recovery, on that ground. If this defence can be maintained, of course the railroad company will have no occasion to invoke the aid of the act of 1872. Thus, in the state court, the decree is used to shield the act from attack, while in this court the act is invoked to sustain the decree—a truly ingenious line of legal strategy. The court will see from this statement that it is, or may be, of practical importance to the city to reverse this decree.

And to do so it is not necessary for this court to pass upon the constitutionality of the act of 1872. That question may well be left where tt belongs, with the state court. Supposing the act to be valid, it cannot have the curative effect claimed for it upon this deceee, for several reasons, viz.:

1st. As already observed, it furnishes no answer whatever to the objections urged against the decree, in points I. and II. of the preceding argument.

2d. The decree proceeds wholly on the ground of the original illegality of the tax; and this erroneous adjudication is just as effectually incorporated into it, as the injunction itself, which is simply the legal consequence supposed (though erroneously) to result from such illegality.

3d. By the very terms of Sec. 9 (the one relied on), of the act of 1872, *such* railroad companies *only*, as "shall have paid all taxes on gross earnings *provided for by Chap.* 106 *of the acts of the Thirteenth General Assembly*," are released from the payment of the taxes now in controversy. (See copy of the section, pp. 6 and 7 of the opposite argument.)

The Act here referred to as Chap. 106 of Acts of Thirteenth General Assembly, was passed April 12th, 1870, *after* the rendition of the decree appealed from. (Laws of Iowa, 1870, p. 109). Of course the record in this case affords no information whether taxes assessed on the C., R. I. & P. R. R. Co., under that law, enacted after the decree, have been paid or not; and the court will hardly take judicial notice of the fact. Evidently, extrinsic averment and evidence is needed to bring the railroad company within the scope of the releasing act. For ought appearing in this record, they are not entitled to its benefit.

4th. Sec. 10 of the Act of 1872 (immediately following the releasing section), reads as follows:

"*No provision* of this act shall be held to apply to any *railroad bridge* across the Mississippi or Missouri river, but such bridges shall be assessed and taxed on the same basis as the property of individuals." (Laws of Iowa, 1872, p. 32, Sec. 10).

This is copied *verbatim* from Sec. 6 of the Act of April 12th, 1870, just referred to. Under that act, since 1870, the bridges referred to have been taxable for *state and county* as well as city purposes, in the same manner as individual property; and they were so taxable *before* by cities, as held in 32 Iowa, 427. Unquestionably it was the purpose of Sec. 10 of the Act of 1872, to except these past bridge taxes from the operation of the release in Sec. 9, as well as to exclude such bridges from the *prospective* scheme of taxation provided for other railroad property by that act. The language is general and sweeping: "*No provision* of this act shall be held to apply," &c.

Now, it appears on the face of the bill in this case, that a part of the tax complained of, and enjoined by the decree, was levied on the "north half of the railroad bridge crossing the Mississippi river, inside the city limits," valued at $125,000. (Record, p. 4, folio 7; copy of assessment, record, p. 5). By the very terms of the Act of 1872, this tax is not released.

Some stress seems to be laid by the opposing counsel, on the general repealing clause of the Act of 1872. He does not point out *what* law affecting this case, is claimed thereby to be repealed. Is it the taxing clause in the charter of Davenport? If so, the city is left in a sorry predicament. A general statute of Iowa provides that "The repeal of a statute does not revive a statute previously repealed; nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed." (Revision of 1860, p. 6. Subdiv. 1.) It is not perceived what additional force is given to the argument by the repealing clause.

This suit is an ingenious attempt to withdraw from the state courts the interpretation of state statutes, affecting state corporations, by the device of making a non-resident stockholder plaintiff on the record. In *Dodge vs. Woolsey*, the Ohio tax law was assailed as conflicting with the federal constitution; which afforded a substantial ground for resorting to the federal courts. No such excuse exists here.

With these remarks, the cause is submitted to the judgment of the court.

JOHN N. ROGERS,
For Appellants.

IN THE

SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, A. D. 1873.

THE CITY OF DAVENPORT AND
JOHN KAUFMAN, MARSHAL OF SAID CITY,
Appellant,
vs.
DAVID DOWS,
Appellee.

No. 190.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES,
DISTRICT OF IOWA.

ARGUMENT OF THOS. F. WITHROW,

FOR THE APPELLEE.

Inter-Ocean [Beach & Barnard] Print, Chicago.

IN THE

SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, A. D. 1873.

THE CITY OF DAVENPORT AND
JOHN KAUFMAN, MARSHAL OF SAID CITY,
Appellant,
vs.
DAVID DOWS,
Appellee.

No. 190.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES,
DISTRICT OF IOWA.

ARGUMENT OF THOS. F. WITHROW,

FOR THE APPELLEE.

Inter-Ocean [Beach & Barnard] Print, Chicago.

IN THE

SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, A. D. 1873.

THE CITY OF DAVENPORT AND
JOHN KAUFMAN, MARSHAL OF SAID CITY,
Appellant,
vs.
DAVID DOWS,
Appellee.

No. 190.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES,
DISTRICT OF IOWA.

ARGUMENT OF THOS. F. WITHROW,

FOR THE APPELLEE.

Inter-Ocean [Beach & Barnard] Print, Chicago.

ARGUMENT.

We prefer to argue the propositions advanced by the counsel for the appellant in the inverse order of their arrangement, for the reason that this will bring us directly to the merits of the case.

I.

We deny the claim that the law of the State of Iowa relating to the taxation of railroad property by municipal corporations is settled, or ever has been, as asserted by the counsel for the appellant. The charter of the city of Davenport was approved in February, 1851. It conferred upon the city council the "power and authority to levy and collect taxes upon all taxable property, real, personal and mixed, within the city," etc. On the same day the statute known as the "Code of 1851," was approved. This act provided that "the property of corporations or companies constructing canals, railways, plank roads, graded roads, turnpike roads, and similar improvements," shall be taxed, "through the shares of the stockholders." (Section 462.) This was incorporated in "an act in relation to revenue," approved in March, 1858. (Laws 1858, Chap. 151, Sec. 7.) This act was repealed by another "act in relation to revenue," approved April 3d, 1860. (Reprinted in Rev. of 1860, § 710–809.) Section 3 of this act (Rev. § 712) referring to the classes of exempted property, uses this language: "All other property, real and personal, within the State, is subject to taxation, *in the manner directed*," etc. It is claimed that this act conferred upon the city of

Davenport the power to assess the real and personal property of railway companies within its limits for municipal purposes. This act was amended by Chapter 173, Laws of 1862, approved April 8th, of that year. The sixteenth section of this act required the railroad companies of the State to return to the Treasurer of State a sworn statement of the gross receipts of the several companies for the year ending on the 1st day of January preceding the report. Upon the amount of such gross receipts the Treasurer was required to levy a tax of one per centum. The section proceeds :

> The tax herein provided for shall be in lieu of all taxes for any and all purposes on the road-bed, track, rolling stock, and necessary buildings for operating their road.

The nineteenth section declared that "all acts and parts of acts in conflict with any of the provisions of this act are hereby repealed." The act of 1860 provided for the taxation of the real estate and personal property of railroad companies "in the manner directed" by said act—that is by valuation of the property in the taxing district and the imposition of rates levied against other property in the same district. The provision of the law of 1862, imposing taxes by a fixed per centum upon the gross receipts, was inconsistent with the law of 1860, and therefore repealed it. Placing out of view any construction of the words "in lieu of all taxes for any and all purposes," the conclusion is irresistible that the taxation of railroad property in the manner directed by the act of 1860 was abrogated. The city of Davenport did not take this view of its powers, and proceeded to levy taxes upon the right of way and other real estate constituting a part of the road in "the manner directed" by the act of 1860. The question thus raised was presented to the District Court in an amicable suit—*The City of Davenport* v. *The Mississippi* *and Missouri Railroad Company.* The Court held and decided that the city had no power to levy municipal taxes upon any of the property constituting a part of, or used in, operating the road. An appeal was taken to the Supreme Court, which consisted of four judges. The Court was divided. We have never understood that the fact that Mr. Justice WRIGHT, has since become a U. S. Senator, or that Mr. Justice DILLON has since been made a Circuit Judge in the Courts of the United States, added anything to the weight of their opinions in that case. The result of the division of opinion was an affirmance of the judgment below. The legislature permitted the law to remain in this condition until 1868. In April of that year there was enacted "an act to repeal Section 16 of Chapter 173, Laws of Ninth General Assembly, regulating the levy and collection of taxes on gross receipts of railroad companies, and to enact a substitute therefor." There was no material difference between this act and the section for which it was substituted. We quote one sentence. "The tax herein provided for shall be in lieu of all taxes for any and all purposes, on the road-bed, track, rolling stock and necessary buildings for operating their road." (Laws 1868, Chap. 196.) In 1870 the legislature passed another "act for the taxation of railroad property," which also provided for levying taxes by a sliding scale of rates upon gross earnings, and declaring that "the taxes herein provided for shall be in lieu of all taxes for any and all purposes on the road-bed, right of way, track, rolling stock, and necessary buildings for operating their road," and that "all acts and parts of acts inconsistent with this act are hereby repealed." (Laws of 1870, Chap. 106.)

In the meantime the city of Dubuque, existing under a charter similar to that of the city of Davenport, levied taxes in the manner prescribed by the law of 1860, upon the railroad of the Dunleith and Dubuque Bridge Company. The collection of the tax was resisted upon the ground that the tax paid upon gross earnings, under the act of 1862 was "in lieu of all taxes for any and all purposes." A majority of the Supreme Court held that "any and all purposes" meant "State and county purposes." Mr. Justice Cole having remained a Justice of the Supreme Court, instead of being translated to the Federal Senate or a Federal Court, delivered a dissenting opinion, adhering to the construction of the statute for which he contended in 1864 in *The City of Davenport* v. *The Mississippi and Missouri Railroad Company.* In his dissenting opinion he makes this declaration:

> The legislature has twice enacted this same provision, and once since this Court refused to change its meaning, as it is now sought to be changed, and has said that the tax of one per cent. as prescribed by the act "shall be in lieu of all taxes, for any and all purposes." The foregoing opinion says not so, but it shall only be in lieu of all taxes for State and county purposes. If the legislature had so intended, it could easily and directly have so said. But it has not, and I know of no rule of construction, nor does the foregoing opinion claim that there is or refer to any, which will authorize such a change of the language from its plain meaning.

The opinion in *The Dunleith and Dubuque Bridge Company case*, (32 Iowa, 427,) to which we have just referred, was announced on the 18th of October, 1871; and the next session of the General Assembly commenced on the 8th day of January, 1872. Its members were elected after the announcement of this decision. In the 26th Chapter of its acts, it adopted an entirely new system of assessing taxes upon railroad property, and materially increased the burdens imposed upon such companies. The ninth section of this act reads as follows:

> Every railroad company which shall have paid all taxes on gross earnings provided for by Chapter 106 of the acts of the Thirteenth General As-

sembly, shall be released from the payment of all other taxes which may have been levied upon the road-bed, right of way, track, rolling stock, and necessary buildings for operating their road, and no taxes for prior years for State, county, municipal, or any other purpose, for which any tax can be levied under the laws of the State, up to the first day of January last, shall be collected from any such railroad company on such property.

The records of the General Assembly show that this bill was passed by over eighty votes out of the hundred members of the house, several of whom were absent, and by a vote nearly as unanimous in the Senate. We are not ignorant of the rule that it is not the province of the legislative department of the government to construe statutes. Its action is entitled to consideration in ascertaining how the law of the State is settled, as well as indicating the legislative understanding of the purpose of the statute.

2. The act of 1872, Chap. 26, sec. 9, (above copied), not only releases the railroad company from the payment of the taxes mentioned in the bill and decree, but declares that they shall not be collected. If the case were now pending in the Court below, it would be the duty of the Court to make the decree now under review. If that decree shall be reversed and the cause remanded for further proceeding, it will be the duty of the Court to execute the law of the State, now settled by legislative enactment, forbidding the collection of these taxes. While it is true that the act was passed after this suit was commenced and after this decree was entered, its effect is to make any step toward a collection of these taxes unlawful.

In the case of "*The Clinton Bridge*," (10 Wall., 454), a bill was filed, praying that the Chicago, Iowa and Nebraska Railroad Company be enjoined from building a bridge across the Mississippi river at the town of Clinton. On the final hearing, the defendants' counsel "objected to the proofs of the complainant being read, on the ground that *since the erection of the bridge,*" Congress had passed an act declaring it "a lawful structure." The act was passed *while the suit was pending.* The objection was sustained by the Circuit Court, and that ruling was affirmed by this Court, following the *Wheeling Bridge Case,* (18 How., 429). In that case a decree of the Court was held to be modified by act of Congress passed after the final hearing, and such legislation was sustained upon the ground that it affected only *public* rights. Said NELSON, J., in delivering the opinion of the Court:

> The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of Congress. * * * * * Now, we agree, if the remedy in this case, had been an action at law, and a judgment rendered in favor of plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the Court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future, existing, or continuing obstruction, depends upon the question whether or not it interferes with the right of navigation. If, in the meantime, since the decree, this right has been modified by competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the Court cannot be enforced.

Taxes can be levied and collected only by the exercise of sovereign power. The legislature may control such levies and collections as completely as Congress may control the navigable waters of the United States. If an act of Congress will abrogate a decree, asserting a public right, an act of the legislature will sustain and support a decree which affects only an exercise of sovereign power, under the control of the State. In *Exparte McCardle* (7 Wall., 514), the repeal of a statute conferring appellate jurisdiction upon this Court in a certain class of cases, was repealed after a cause belonging to that class had been submitted. It was held to deprive the Court of jurisdiction.

3. The act of 1872 (Chap. 26, § 13) repeals all laws inconsistent with its provisions. It will not be claimed that the act under which this tax was levied is consistent with the act of 1872. As to the effect of the repeal of an act upon an action pending, see *Exparte McCardle*, (7 Wall., 541); *Norris* v. *Crocker*, (13 How., 429), and *The Insurance Company* v. *Ritchie*, (5 Wall., 541). This appeal was not perfected until after the repeal.

II.

Appellant's second point is that "a suit in equity will not lie to restrain the collection of a tax on the sole ground of its illegality;" in support of which *Dows* v. *Chicago*, (11 Wall., 108), and *Hahnewinkle* v. *Georgetown*, (15 Id., 547), are cited.

1. The counsel for appellant, anticipating our answer to this objection to the decree, attempts to parry its force. While it is true, that ordinarily, special circumstances should be alleged to give a Court of Equity jurisdiction, in such cases, the jurisdiction in this case arises out of the relation of the parties. That a stockholder may bring a suit when a corporation refuses,is settled in *Dodge* v. *Woolsey* (18 How., 340). In the opinion of the Court the jurisdiction is founded upon the theory of a breach of trust. A stockholder can have a remedy only in equity. He cannot sue the collector at law, neither can he maintain replevin. No court of law can give him a judgment for moneys which the corporation

has paid; and he could not recover possession of the corporate property.

It is claimed by the counsel that *Dodge* v. *Woolsey* was modified by *Dows* v. *Chicago*. Not only is the former case not mentioned in the latter, but the questions in the first were not presented in the second. There is no warrant in the latter case for the assumption that the former should now be considered as overruled, and " that no such decree as was made in the former should now be upheld."

2. Revenue laws of Iowa provide " that taxes due upon real property are hereby made a perpetual lien thereupon against all persons except the United States and this State." (Rev. 1860, § 758). That this tax was a cloud upon the title, if illegal, is manifest from the statute.

The other points made by counsel do not affect the merits of the case before the Court, and for this reason we give them no further attention. If the case should be reversed, it should be remanded for further proceedings, in accordance with the opinion of the Court, and not with an order directing the bill to be dismissed. A defect of parties, or the omission to allege special facts, giving a Court of Equity jurisdiction, can be easily cured by amendment. If the Court should be of opinion that on the merits the decree should be as it was entered in the Court below, this litigation would be ended.

THOS. F. WITHROW,

Solicitor for Appellee.

4

160
40

200

In the Supreme Court of Iowa,

JUNE TERM, 1873.

THE CITY OF DAVENPORT, PLAINTIFF AND APPELLANT, VS. THE CHICAGO, ROCK ISLAND, & PACIFIC RAILROAD COMPANY, DEFENDANT AND APPELLANT.	AGREED ABSTRACT OF RECORD.

AT LAW.

Cross Appeals from the Judgment of the Scott District Court.

J. N. ROGERS,
For the Plaintiff.

COOK, RICHMAN & BRUNING, *For the Defendant.*

On the 26th day of January, 1872, the plaintiff filed in the Scott County District Court a

PETITION,

stating its cause of action as follows:

1st. Your petitioner, the City of Davenport, a municipal corporation created by the laws of the state of Iowa, claims to recover of the Chicago, Rock Island & Pacific Railroad Company, a corporation organized under and by virtue of the laws of said state, the sum of thirty thousand dollars, and for cause of such claim states:

That the said defendant is a corporation owning and operating a railroad from the said city of Davenport westward to

Council Bluffs, in said state, and owns, and has owned from the year 1866, to the present time, real estate situate within the corporate limits of said city of Davenport, and liable to taxation by said city, to-wit: Its depot grounds and buildings thereon, its railway tracks, side tracks, switches, and road bed within the limits of said city, and the north half of its railroad bridge across the Mississippi river, also within said city, and other real estate situate within said city.

That in the year 1867, there was levied by the city council of said city, under and in pursuance of its charter and ordinances, on the said property of said defendant, which was duly assessed to the defendant for taxation, in common with all other taxable property within said city, a general or ordinary tax of five mills on the dollar of the assessed value of said property, and also a road tax of three mills on the dollar of said assessed value. That the amount of said taxes so levied on the property of said defendant was the sum of two thousand two hundred and eighty dollars. That a warrant for the collection thereof was duly executed and delivered to the Marshal of said city for collection, who thereupon duly demanded payment thereof of the said defendant. But the said defendant refused and has ever since refused to pay said taxes or any part thereof, and the same still remains due and wholly unpaid.

2d. And for further cause of such claim, your petitioner alleges that there was in like manner, in the year 1868, levied by the city council of said city, upon the taxable property of said defendant (being such as is alleged in the first count hereof, and duly assessed to the defendant for taxation), in common with all other taxable property in said city, a general or ordinary tax of five mills on the dollar of the assessed value of said property, and a road tax of three mills on the dollar of said assessed value, which taxes on the defendant's said property amounted to twenty-six hundred dollars. That a warrant for the collection thereof was duly executed, and delivered to the Marshal of said city, who made due demand of payment thereof of said defendant, but that said defendant refused and has ever since refused to pay said taxes, or any part thereof, and the same still remains due and wholly unpaid.

3d. And for further cause of such claim, your petitioner alleges that in the year 1869, there was in like manner levied by the city council of said city, on the taxable property of said defendant (being such as is alleged in the first count hereof, and duly assessed to the defendant for taxation), in common with all other taxable property within said city, a general or ordinary tax of five mills on the dollar of the assessed value of said property, and a special tax of five mills on the dollar of said assessed value, for the purpose of paying judgments against said city, and a road tax of three mills on the dollar of said assessed value. All which taxes on the said property of said defendant amounted to the sum of four thousand eight hundred and seventy-five dollars. That a warrant for the collection of said taxes was duly issued to the City Marshal of said city, who duly demanded payment of said taxes from the defendant, but that said defendant refused and has ever since refused to pay said taxes, and the same still remain due and wholly unpaid.

4th. And for further cause of such claim, your petitioner alleges that in the year 1870, there was in like manner levied by the city council of said city, on said taxable property of said defendant (being such as is alleged in the first count hereof, and duly assessed to said defendant for taxation), in common with all other taxable property in said city, a general or ordinary tax of five mills on the dollar of the assessed value of said property, and also a special tax of twenty mills on the dollar of the assessed value, for the purpose of paying judgments against the said city, and interest on its bonded indebtedness, and also a road tax of three mills on the dollar of said assessed value. That the amount of said taxes so levied on the property of the defendant is the sum of seven thousand dollars. That a warrant for the collection thereof was duly issued to the City Marshal who made demand of the defendant for the payment thereof, but that said defendant refused and has ever since refused to pay said taxes, or any part thereof, and the same remain due and wholly unpaid.

5th. And for further cause of such claim, your petitioner alleges that in the year 1871, there was in like manner levied by the city council of said city, on the said taxable property of the said defendant (being such as is alleged in the first count hereof, and duly assessed to said defendant for taxation), in common with all other taxable property in said city, a general or ordinary tax of five mills on the dollar of the assessed value of said property, and also a special tax of ten mills on the dollar of said assessed value, for the purpose of paying judgments against said city, and interest on its bonded debt, and also a road tax of three mills on the dollar of said assessed value. That the amount of said tax so levied on the property of the defendant, was the sum of five thousand one hundred and sixty-six dollars. That a warrant for the collection thereof was duly issued to the City Marshal of said city, who duly demanded payment thereof of defendant, but that said defendant refused and has ever since refused to pay the same, except the sum of two thousand and sixteen dollars ($2,016) which it has paid, and the remainder of said tax being the sum of three thousand one hundred and fifty dollars is still due and wholly unpaid.

Whereupon your petitioner demands judgment against said defendant for the sum of thirty thousand dollars, with interest and costs.

The petition is verified.

Thereafter, upon the 7th day of May 1872, the defendant filed its

ANSWER

to the petition, setting up the following defenses:—

Defendant denies it is indebted to plaintiff in any sum except as hereinafter admitted.

I.

Defendant admits that it is a corporation owning and operating a railroad running from said city of Davenport westward, and that it has owned from the year 1866 to the present time real estate situate within the corporate limits of the city of Davenport; to-wit: its depot grounds and buildings thereon, its railway tracks, side tracks, switches, and road bed within the limits of said city, and the north half of its railroad bridge across the Mississippi river, within the limits of said city; but defendant denies that said property or any part thereof was subject to taxation by said city for any of the years from 1867 to 1871, both inclusive, excepting the said north half of the railroad bridge, which defendant admits was liable to city taxation for the years 1870 and 1871.

Defendant admits that the city council of the city of Davenport did levy taxes on defendant's property (which property is above described in general terms, and defendant refers to plaintiff's tax record for a particular description of said property) for the years stated in the petition, and for the respective amounts stated in the petition. But defendant avers that said plaintiff had no power or authority to levy or collect such tax or any part thereof for any of the years, excepting the tax on said north half of the railroad bridge at Davenport, for the years 1870 and 1871. Defendant states that for each and every of said years, at the periods required by law, it had fully paid to the state of Iowa the tax upon its gross receipts according to the requirements of the laws of Iowa, and that such payment was in lieu of any and all other taxes, including taxes which might have been levied by the said city of Davenport for said years, upon the property described in plaintiff's petition.

II.

Further answering, defendant avers that the same identical property upon which plaintiff now seeks to recover the taxes for the years stated in petition, belonged to a railroad corporation known as the Mississippi and Missouri Railroad Company, from the time of the construction of said railroad, in about the year 1854, until July, 1866. That said city of Davenport levied taxes for the years 1863, 1864, and 1865 upon the same identical property for which it claims taxes (for subsequent years) in this suit, and so levied the said taxes while the same law existed relative to taxing gross receipts of railroad companies in lieu of all other taxes, as existed at the time of the levy of the taxes now sued for. Defendant states that on the 15th of October, 1864, the said Mississippi & Missouri Railroad company filed in this court its petition against said city of Davenport, for an injunction to restrain the collection of said taxes for the years 1863 and 1864, and thereafter upon November 23d, 1865, filed its supplemental petition praying for the same relief as against the taxes of 1865, levied by said city of Davenport, after the filing of original petition. Said action was numbered 8288, and reference is had to the record thereof as fully as if it were completely incorporated herein. And at the February Term, 1866, this court entered a decree in said cause, whereby it was determined that said city of Davenport, plaintiff herein, had no power or authority to levy or collect any taxes upon said property or any part thereof, and said city was by said decree perpetually enjoined from ever collecting or in any manner attempting to enforce collection of said taxes.

This defendant avers that in the year 1866 certain mortgages existing as liens upon the said M. & M. R. R. Co.'s property were foreclosed in the Circuit Court of the United States for the District of Iowa; and under the decree of foreclosure a sale of said property was thereafter made, and all the property of said M. & M. R. R. Co. was purchased by this defendant, including the property in the city of Davenport, upon which city taxes had been levied as aforesaid, and being the same property upon which plaintiff is now seeking to collect taxes for subsequent years.

Defendant avers that by reason of said decree entered by this court in February, 1866, and of other facts in this division stated the said plaintiff is estopped from collecting the taxes as claimed in its petition, or any of said taxes except for years 1870 and 1871, upon the north half of the railroad bridge, and ought not further to maintain its said action.

III.

Further answering, defendant states that said city of Davenport, in and for the year 1868, levied taxes upon the same identical property as described in the petition in this case, while the same law existed relative to taxing gross receipts of railroad companies in lieu of all other taxes, as existed at the time of the levy of the taxes now sued for. And upon the 28th day of October, 1868, one David Dows, a citizen of the state of New York, and a stock holder in defendant's railroad, filed his bill of complaint against the city of Davenport, in the Circuit Court of the United States for the District of Iowa, to restrain the said city from collecting said tax or any part thereof levied upon defendant's property as aforesaid; and such proceedings were had in said action as that on the 2d day of November, 1869, a decree was entered by said court that said city had no power to levy or collect said tax, and perpetually enjoining any attempt to so collect it. Defendant attaches hereto a full and complete verified transcript of the record of said cause and the decree therein, and makes the same a part of this answer. And defendant avers that the right of said city of Davenport to collect the tax for 1868 (being the same identical tax named in the 2d count of petition herein), has thus been once fully adjudicated and determined against said city; and said city is thereby estopped from collecting all the other taxes sued for in the petition herein, except the tax on north half of bridge for 1870 and 1871, and ought not further to maintain its said action.

IV.

Further answering, this defendant avers that plaintiff has no right, power, or authority to enforce the collection of any taxes which may have been levied upon defendant's road bed, right of way, track, and depot building, for that this defendant has always heretofore and since its existence paid all taxes on gross earnings provided by law, and so, by virtue of Chapter 69, of the Laws of the 14th General Assembly of the State of Iowa, approved April 6th, 1872, this defendant is released from any claims of said city of Davenport for any and all taxes upon said described property prior to the 1st of January, 1872.

V.

Defendant admits that by virtue of Section 6 of Chapter 106, Laws of 13th General Assembly (1870), the plaintiff had the right and authority to levy and collect taxes on the north half of the railroad bridge across the Mississippi river, being that part of the bridge within the limits of the city of Davenport; and defendant avers that it did, on August 26th, 1871, fully pay the tax of said city of Davenport for the year 1871 on said north half of the bridge, amounting to $1,350.00 and at the same time paid $666.00 tax on certain real estate belonging to it, but not then used for railroad purposes — making a total payment of $2,016.00 and being the same payment referred to in the 5th count or paragraph of plaintiff's petition. And defendant states that as for taxes for the year 1870, upon the north half of the said railroad bridge, the valuation thereof for the said year was $125,000 — the tax was 28 mills — and said plaintiff is entitled to the sum of $3,500 for said taxes, for which amount and costs to the date of filing this answer defendant tenders judgment.

Said answer was duly verified.

Attached to said answer as an exhibit, and marked "Exhibit A," is a full transcript of pleadings and record in the case of David Dows *v.* The City of Davenport and John Kauffman, as shown by the records and files of the Circuit Court of the United States in and for the District of Iowa. The bill of the said David Dows sets forth that complainant is holder and owner of stock in the Chicago, Rock Island & Pacific Railroad Company, of the value of $53,000; that said railroad company owned by virtue of purchase at judicial sale, the property and franchises of the old Mississippi & Missouri Railroad Company, in Iowa; that the city of Davenport pretends and insists it has a right to tax for city purposes the property of said C., R. I. & P. R. R. Co., situate within its limits — and has caused its assessor to assess such property of said railroad — depot grounds, buildings, tracks, side tracks, switches, &c, including the north half of the railroad bridge, and has levied and assessed for revenue purposes upon said property a tax amounting to $2,600, and directed its city marshal, John Kauffman, to collect the same. That said Kauffman has officially notified said railroad company of the levy of said tax for the year 1868, and threatens distress to collect the same. Complainant says said railroad company are not liable for the payment of said tax; pleads the 16th Section of the Act of April 8th, 1862, of the General Assembly of Iowa; avers that the property upon which said tax is levied is "the road bed, tracks, rolling stock, and necessary buildings for operating the road," and that the said tax is not levied upon "other property belonging to the road;" pleads the repeal of said Act and the Act of said General Assembly of April 8th, 1868, upon the same subject, by which it is provided that the tax therein provided for "shall be in lieu of all taxes for any and all purposes on the road bed, track, rolling stock, and necessary buildings for operating the road," alleging the same to be in full force and effect. That the said railroad company has, on its part, complied with the provisions of said laws, and paid the taxes assessed thereunder.

Complainant insists said railroad company is not liable for the payment of any tax to the said city of Davenport for revenue purposes, but if liable to any such tax, it could only legally be taxed through and upon the shares of the stock holders.

Complainant says said railroad company has refused and neglected to interfere to prevent the levy and collection of said tax, wherefore he files his bill to prevent the collection of said tax. He prays a writ of subpœna against said defendants; that the said tax be declared null and void; that a perpetual injunction issue enjoining the defendants and the agents and officers of said city of Davenport from collecting any tax for revenue purposes, and particularly the tax herein referred to, and generally for relief.

The bill is verified, and attached thereto as an exhibit is a copy of the assessment, particularly describing the property of the Chicago, Rock Island & Pacific Railroad Company within the city limits of the city of Davenport.

Said transcript further shows a notice of a motion for injunction to be heard on or after October 28th, 1868, and to be made in behalf of the complainant, to restrain defendants from collecting tax for the year 1868, with return of United States marshall for District of Iowa thereon, showing personal service upon defendants.

Also the writ of subpœna issued in said cause, and the return thereon, showing its due service upon defendants.

Also record entry in said cause, showing that on 30th October, 1868, at a hearing in said court of said motion for injunction, it is ordered by the court that injunction issue as prayed, upon plaintiffs giving bond in the sum of $500.

Also the injunction bond provided for in the last mentioned order of the court, and the indorsment thereon of its approval by the court.

Also a writ of injunction issued in said cause from said court, October 30th, 1868, commanding said defendants to refrain from collecting or proceeding to collect any tax for revenue purposes for the year 1868 from the Chicago, Rock Island & Pacific Railroad Company, or levying upon or taking any property of said railroad company, with purpose or intent to collect said tax, and a return thereon endorsed showing legal and personal service of said writ.

Also stipulations for continuance between the parties and record entries pursuant thereto.

Then a demurrer filed by defendants December 30th, 1868, demurring to the prayer of complainant's bill, for the reasons: 1st. That the Chicago, Rock Island & Pacific Railroad Company is the real party in interest, yet is not a defendant. 2d. That the court has no jurisdiction, because said suit is for the benefit of said railroad company—that said company is a citizen of Iowa, and a citizen of the same state as the defendants. 3d. That the Iowa state courts have exclusive jurisdiction of the matters in controversy, and 4th, that complainant has complete and adequate remedy at law.

Also filed same day in said cause and court, a demurrer of defendants, demurring to such portions of the bill as construe the laws of Iowa with reference to the liability of the railroad company for said tax, for the reasons: 1st. That the city of Davenport has full power to levy and collect tax for revenue purposes upon the property assessed by its assessor, as set forth in the bill. 2d. That the said portions of Acts of the General Assembly of 1862 and 1868, relied on by complainant are unconstitutional. 3d. That said Acts have no reference to taxation of railroad property for *municipal* revenue purposes, such as provided by the charter of the city of Davenport, but only to taxation of such property for state and county purposes. 4th. That by the laws of Iowa, said property is taxable as real property, and not upon the shares of stock holders; and 5th, that the state treasurer has no power or authority to levy a tax on the road bed, depot grounds, &c., of the railroad company, but only, if at all, on gross receipts of said company.

Also was filed the demurrer of John Kauffman, on the 30th day of December, 1868, demurring for the reason that he is improperly joined as a party defendant in said bill.

Also record entry in said cause, of date November 2d, 1869, showing that upon hearing of said cause then had upon demurrer of respondents, the demurrer is overruled, and respondents refusing to answer over, the equities are adjudged with the complainant—the injunction is made perpetual—"and that the said city of Davenport and the said John Kauff-"man and all other officers of said corporation, do absolutely "desist and refrain from levying, assessing, or collecting any "tax from the said Chicago, Rock Island & Pacific Railroad "Company mentioned in the bill in this case, and that said re-"spondents be perpetually enjoined and restrained from so "doing," &c.

Said transcript is duly certified by the clerk of said court as full and complete.

And on the 8th day of May, 1872, the plaintiff filed a

MOTION

for judgment for part of his claim as follows: The plaintiff moves the court that a judgment be now rendered against the defendant for the sum of thirty-five hundred dollars, being part of the plaintiff's claim herein, admitted in defendant's answer and not controverted thereby, without prejudice to plaintiff's right to proceed with the action for the recovery of the residue of its claim in pursuance of Sec. 3135 of the Revision of 1860.

And the same day, to-wit, May 8th, 1872, plaintiff filed a

DEMURRER

to the answer of defendants as follows;

1st. To the first plea or division of defendant's answer for the reason,

That said plea or division states no facts constituting any defense to the plaintiff's claim herein nor to any part thereof, inasmuch as the payments therein alleged to have been made by the defendant to the state of Iowa were not, as matter of law, in lieu of any tax or taxes which might have been levied by the plaintiff on the property of said defendant, and such payments constitute no bar to the plaintiff's claim herein.

2d. To the second plea or division of said answer for the reason:—

That the matters stated in said division of the answer are insufficient in law to constitute any bar or defense to the plaintiff's claim herein, or any part thereof, because it appears therefrom,

First. That the taxes sought to be recovered for in this suit are other and different taxes, and levied for other and different years than those which were in controversy in the suit, or proceeding in this court, referred to in said division of the answer, and the judgment rendered in said suit or proceeding constitutes no bar or estoppel against the recovery of the taxes set forth in the petition herein.

Second. Because the said defendant herein was not a party to said suit or proceeding set forth in said division of the answer, and it does not appear therefrom that the said defendant herein is in privity with the said Mississippi & Missouri Railroad Company, in respect to said suit or decree, so as to be entitled to the benefit of any estoppel created by said decree.

3d. To the third plea or division of said answer for the following causes:—

First. That the said defendant does not appear thereform to have been a party to the suit or proceeding in the Circuit Court of the United States therein set forth, nor to be in legal privity with any party thereto, and not being itself bound by the decree therein, is not entitled as between it and the plaintiff herein, to the benefit of said decree by way of estoppel.

Second. That the said decree in the Circuit Court of the United States is null and void for want of jurisdiction in said court to render the same.

Third. That the defense set up in said third division of the answer is pleaded as a defense to the whole of the petition, and to every count thereof, whereas it is good as a defense (if at all) only to the second count of the petition.

4th. To the fourth plea or division of said answer, as follows:—

First. That the matters stated in said plea or division constitute no sufficient defense to the plaintiff's claim, because so much of the said Act of the Fourteenth General Assembly therein referred to, as purports to release the defendant, or any railroad corporation, from liability for municipal taxes heretofore levied, is unconstitutional, null and void.

Second. That said plea discloses no defense to so much of plaintiff's claim as is based upon taxes on defendant's railroad bridge across the Mississippi river, and being pleaded to the whole petition, is bad *in toto*.

The entries in said cause show the disposition made of the foregoing motion, and demurrer, to be as follows:—

The foregoing motion was submitted to the court for decision, upon written arguments of counsel, on both sides, and the counsel for defendant, in their said argument asked leave, "If the court should look at the case from the same stand-point that plaintiff does, to amend their answer by striking out the last clause of the fifth paragraph thereof." And the court thereupon, to wit., on the 6th day of November, 1872, sustained said motion, said demurrer being still undisposed of, and refused to allow said amendment, and ordered judgment in favor of plaintiff, as claimed in said motion. To each and all of which rulings, opinions, decisions, and order of the court, the defendant then and there excepted.

This cause coming on to be heard upon the plaintiff's motion for judgment against defendant for the sum of thirty-five hundred dollars, being part of plaintiff's claim not controverted by defendant's answer, without prejudice to plaintiff's right to proceed with the action for the recovery of the residue of its claim, in pursuance of section 3135 of the Revision of 1860. And the parties appearing by their respective attorneys, after argument for and against said motion, the court sustains the same and orders judgment accordingly for the plaintiff, for the said sum of $3,500, with interest thereon from the 8th day of May, 1872.

Therefore it is considered that the plaintiff have and recover of the defendant, for and on account of the tax levied by said city for the year 1870 on the north half of the defendant's railroad bridge across the Mississippi river, (being a part of the plaintiff's claim herein not controverted by defendant's answer), the sum of thirty-six hundred three and 25-100 dollars, and have execution therefor; and that as to the residue of the plaintiff's claim controverted by said answer, the cause proceed for the determination of said claim according to law.

To which defendant excepted.

Thereafter, to wit., on the 14th day of February, 1873, this cause coming on to be heard upon the plaintiff's demurrers to the first, second, third, and fourth pleas or divisions of the defendant's answer, and after argument in support of, and in opposition to said demurrers by the counsel for the respective parties, the court being fully advised in respect thereto, doth order and adjudge that the said demurrers to the first, second, and third pleas or divisions of the answer be, and the same are hereby sustained, and said portions of the answer are adjudged to be insufficient in law; to which ruling and judgment the defendant excepts.

And the court doth further order and adjudge that said demurrer to the fourth plea or division of the answer be and the same is hereby overruled; to which ruling and judgment the plaintiff excepts.

On the 14th day of February, 1873, plaintiff gave due notice of appeal to the Supreme Court from the order of the District Court overruling the plaintiff's demurrer to the fourth plea or division of defendant's answer.

On the 17th day of March, 1873, defendant gave due notice of appeal to the Supreme Court from the judgment of the

District Court for the sum of three thousand six hundred and three dollars and seventy-five cents upon plaintiff's motion therefor; also from the order of said court in sustaining plaintiff's demurrer to the first, second, and third pleas or divisions of defendant's answer.

PLAINTIFF'S ASSIGNMENT OF ERRORS.

The plaintiff assigns for error:

That the Court below erred in overruling plaintiff's demurrer to the fourth plea or division of defendant's answer.

J. N. ROGERS,
Attorney for Plaintiff.

DEFENDANT'S ASSIGNMENT OF ERRORS.

The defendant says there is manifest error on the face of the record, in this:—

1st. The Court erred in sustaining plaintiff's motion for judgment for thirty-five hundred dollars, and erred in entering judgment for $3,603.75.

2d. The Court erred in sustaining the demurrer to the first, second, and third pleas or divisions of defendant's answer; erred in sustaining demurrer to each of said pleas, and erred in not overruling said demurrer.

INDEX.

Petition.. 1–4

Answer.. 4–8

Exhibits to answer.. 8–11

Plaintiff's motion for judgment for part of claim......... 11

Demurrer to answer.. 11–13

Judgment entry on motion.. 13–14

" " " demurrer................................ 14

Plaintiff's notice of appeal.. 14

Defendant's " " "... 14–15

Assignment of errors by Plaintiff and Defendants........ 15